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In The

Supreme Court of the United States

EDUARDO PABON-MANDRELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a district court can sentence a defendant as a three strikes mandatory lifer under Title 21, U.S.C. section 841(b)(1)(A), based on a "prior conviction" for which the offense conduct was an overt act of the federal conspiracy charge and the government presented evidence to the jury.

II. Whether a district court can sentence a defendant as a three strikes mandatory lifer under Title 21, U.S.C. section 841(b)(1)(A), based on two prior convictions for minor possessory drug offenses, where such imposition contravenes Congressional intent to reserve this severe punishment for only the most serious, recidivist narcotics traffickers, and would lead to the absurd result of punishing a first-time drug trafficker with a life sentence with no release.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Petitioner: Eduardo Pabon-Mandrell

Respondent: United States of America

The following individuals were parties to the proceedings below. They are believed to have no interest in the outcome of this petition:

Gabriel Rivera-Rodriguez, a/k/a Gaby Bala, Excel A. Muniz-Massa, a/k/a Excel Muniz-Massa, a/k/a Muniz, Jose Rivera-Moreno, a/k/a/ Joe, Christian Arzola-Martinez, a/k/a Arzola.

Counsel for petitioner is sending their counsel a letter in compliance with Rule 12.6.

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OPINION BELOW

The opinion of the United States Court of Appeals, First Circuit, titled *United States v. Rivera-Rodriguez* and published at 617 F.3d 581, is contained in the Appendix (hereinafter "App.") at pgs. App. 1-64. The Judgment in a Criminal Case underlying this opinion is contained at pgs. App. 65-74

JURISDICTION

The judgment to be reviewed was entered on August 25, 2010. App. 3. Jurisdiction is conferred on this Court by Title 28, U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . .

Title 21, United States Code section 841(b)(1)(A):

* * *

> [A]ny person who violates subsection (A) of this section shall be sentenced as follows:

* * *

> If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release. . . .

STATEMENT OF THE CASE

Mr. Pabon-Mandrell was named with 41 others in Count One of a two count indictment charging conspiracy to possess with intent to distribute, and to distribute, narcotics from 2003 through 2007, as prohibited by Title 21, U.S.C. sections 841(a)(1) and 860, all in violation of Title 21, U.S.C. section 846. App. 4-5. The indictment detailed the parameters of the conspiracy setting forth its object, the manner and means used to effect it, and the overt acts committed in furtherance of it. As an overt act, the indictment alleged that on March 30, 2005, Pabon-Mandrell possessed a "measurable amount" of cocaine and marijuana. App. 58 n.13. At Pabon-Mandrell's federal conspiracy trial, the government presented the testimony of two police officers to prove his possession of approximately 18 grams of cocaine as alleged in the overt act. A jury found Pabon-Mandrell guilty as charged. App. 3, 5-6.

In an information filed pursuant to Title 21, U.S.C. section 851, the government notified Pabon-Mandrell that it was seeking section 841(b)(1)(A)'s three strikes mandatory life sentence. App. 75-77.

The basis was his June 20, 2006, conviction for simple possession of cocaine on March 30, 2005, alleged as an overt act of the federal conspiracy charge, App. 58 n.13, Puerto Rico Criminal Case No. GSC2005G0402, App. 78-81, 85-87, and his June 13, 2006, conviction for simple possession of marijuana and drug paraphernalia on October 18, 2003, Puerto Rico Case Nos. GSC2003G0748 and GSC2003G0749. App. 78-81, 85-87, 91-92.

Over Pabon-Mandrell's objection, the district court relied upon his two prior convictions to support imposition of a three strikes mandatory life sentence. But the court expressed misgivings about the sentence: "For me it is quite difficult to think that a life in prison sentence has to be imposed, not needs to be, *has to be imposed* on an individual so young. . . . Given my determination and the application and the government's filing of the information under 851, *the court is compelled to impose a life sentence*." App. 92. (Emphasis added).

On appeal, Pabon-Mandrell argued that his sentence could not be enhanced based on an offense that was specifically alleged as an overt act of the federal conspiracy charge, and for which the government presented specific testimony to the jury. App. 54. Pabon-Mandrell argued that the government's strategy "waived" its right to claim this conviction was a "prior" conviction under section 841's three strikes lifer provision. App. 58. He further argued that reliance on two minor possessory offenses contravened

Congressional intent and led to an absurd result. App. 63.

The First Circuit Court of Appeals held that, because the charged federal conspiracy offense was "an episode continuing well beyond [Pabon-Mandrell's] prior conviction for a discrete episode of possessing, with the intent to distribute cocaine" App. at 62, it qualified as a prior conviction for the purpose of section 841's three strike lifer provision. Regarding Pabon-Mandrell's argument that his prior convictions should not count toward a life sentence because this would cause the "absurd result" of punishing "'cases of simple possession involving small amounts of drugs' . . . 'counter to Congressional intent' to punish 'dangerous narcotics traffickers,'" App. at 63, the court observed that "besides punishing serious drug offenders," section 841's three strikes sentence enhancement "is to punish recidivism." *Id.* Given Pabon-Mandrell's prior, even minor, drug offenses, the court held it was "neither absurd nor a violation of Congressional intent" to impose a "three strikes life term" on him for his repeat drug offenses. *Id.* at 64.

REASONS FOR GRANTING THE WRIT

I. The First Circuit's Opinion Authorizing Imposition of Section 841's Three Strikes Mandatory Life Provision Based Upon a Prior Conviction for Offense Conduct Fully Encompassed Within, and Charged as a Part of, the Federal Narcotics Conspiracy, Providing the Defendant "Continued to Participate in Drug Activity After the Prior Conviction Became Final," Conflicts With the Decisions of Other United States Courts of Appeals That Require the Prior Convictions to Constitute "Separate Criminal Episodes" From the Federal Narcotics Offense. Review Should Be Granted to Establish Uniformity Among the Circuit Courts and to Establish an Interpretation Consonant With Section 841's Legislative History.

Upon suffering his first ever narcotics trafficking conviction, the district court sentenced Mr. Pabon-Mandrell to a "term of life imprisonment without release." Our law knows of no harsher sentence besides the death penalty. *Graham v. Florida*, 130 S.Ct. 2011, 2027 (2010); *Solem v. Helm*, 463 U.S. 277, 297 (1983). This sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Graham* at 2027 (citation omitted). Although the district court expressed clear misgivings

about being compelled to impose such a harsh sentence on such a young offender, App. 92, it imposed this sentence because it believed it was required by Title 21, U.S.C. section 841(b)(1)(A)'s three strikes mandatory life sentence provision, based on Pabon-Mandrell's two minor felony possessory drug offense convictions. One of these was alleged as an overt act of the federal conspiracy charge for which the government presented the jury evidence.

The determination of whether to impose this severely harsh, second-to-only-death, hopeless sentence turns upon interpretation of section 841(b)(a)(A)'s phrase "prior conviction." The phase is inherently ambiguous and undefined in the Act. The circuit courts of appeals have devised conflicting interpretations as applied to drug offenses that occurred during the course of the federal narcotics offense for which the defendant is to be sentenced. This conflict portends a scenario in which the prospect of a narcotics offender being sentenced to life without release may depend upon the identity of the federal judicial circuit in which the defendant is to be sentenced. To fulfill this Court's crucial role of ensuring the equal and fair administration of criminal justice in the federal courts, *see Wright v. North Carolina*, 415 U.S. 963 (1974). (Douglas, J., dissenting from denial of cert.), this Court should review the opinion below.

Title 21, U.S.C. section 841(b)(1)(A), enacted as part of 1970's Comprehensive Drug Abuse Prevention and Control Act, prescribes penalties for persons engaged in controlled substances trafficking –

"to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense. . . ." In its "three time lifer" provision, enacted as part of 1988's Anti-Drug Abuse Act, P.L. 100-690, 1988 H.R. 5210, the statute renders mandatory, and substantially increases the severity of, the sentence for certain drug trafficker recidivists: "If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release. . . ." Neither section 841, nor the entire Act, *see* Title 21, U.S.C. § 802 (Definitions), defines "prior convictions." *See United States v. Martino*, 294 F.3d 346, 350 (2nd Cir. 2002).

The "plain meaning" of the words used in the statute are clearly the line of first resort for statutory interpretation. *See, e.g., Carachuri-Rosendo v. Holder,* 130 S.Ct. 2577, 2585 (2010); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509-10 (1989). But ambiguity abounds in the phrase "prior convictions." This might be interpreted to encompass all "prior convictions," whether related or not to the federal offense for which a defendant is being sentenced. It might be read to connote only convictions involving criminal conduct entirely distinct in time from the federal offense. Alternatively, the phrase could refer to a class of only certain convictions the offense conduct for which, though perhaps temporarily overlapping and similar to the charged federal offense, constituted a separate criminal episode. *Cf. Green* at 518

(recognizing three different interpretations of "defendant" in Federal Rule of Evidence 609); *Martino*, at 349-50 (recognizing different potential interpretations of "after a prior conviction" in 21 U.S.C. section 841(b)(1)(B)'s minimum mandatory sentence provision).

Clearly, by enacting section 841(b)(1)(A)'s three time lifer provision, Congress intended to target recidivist narcotics traffickers. *See United States v. Lino*, 493 F.3d 41, 43 (1st Cir. 2007); *United States v. Martino*, 293 F.3d 346, 351 (2nd Cir. 2002). This is an entirely legitimate legislative goal: "The propriety of inflicting severer punishment upon [repeat] offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted." *Graham v. West Virginia*, 224 U.S. 616, 623 (1912). But the scope of punishment justified for recidivists also has limits. As the court warned in *United States v. Rice*, 43 F.3d 601 (11th Cir. 1995):

> To hold otherwise would be overbroad and fail to promote the actual purpose of sentence enhancement under section 841(b)(1)(A) – to punish recidivism. If the three previous convictions arose out of a single uninterrupted act of criminality, the defendant would not be the "three-time loser" adjudged by Congress to be deserving of life imprisonment.

Id. at 606.

In *United States v. Blackwood,* 913 F.2d 139 (4th Cir. 1990), the court explored the legislative history of section 841's three strikes lifer provision and emphasized this same limitation. The court focused on the remarks of Senator (now Vice President) Biden, Chairperson of the Judicial Committee at the time the Anti-Drug Abuse Act of 1988 (which enacted section 841's three strikes lifer provision) was passed. As part of the Act, Congress amended Title 18, U.S.C. section 924(e) to clarify the meaning of "previous convictions" and inserted the language "committed on occasions different from one another." *Id.* at 146. Biden noted that this amendment would make clear the interpretation originally intended even though section 924 initially "lacked descriptive language found in other similar federal statutes." *Id.* (quoting 134 Cong. Rec. S17360, S17370 (daily ed. Nov. 10, 1988)). Elaborating upon the purpose of the amendment, then Senator Biden explained:

> "This interpretation plainly expresses the concept of what is meant by a "career criminal," that is, a person who over the course of time commits three or more of the enumerated kinds of felonies and is convicted therefore. It is appropriate to clarify the statute in this regard, both to avoid future litigation *and to ensure that its rigorous sentencing provisions apply only as intended in cases meriting such strict punishment.*"

Id. (emphasis supplied). *Accord United States v. Selby,* 333 F.Supp. 2d 367, 374-6 (D. Md. 2004).

In its opinion under review, the First Circuit held that Pabon-Mandrell's 2005 possession of cocaine qualified as a "prior conviction [ ]" even though it fell temporally in the middle of the federally charged conspiracy, was specifically alleged as an overt act, and the government introduced evidence of it to prove its federal conspiracy charge – "despite being part of the drug conspiracy of which Pabon-Mandrell was charged in the instant case. . . ." App. 59-62. It did so by applying its rule that a prior conviction will qualify as a predicate offense triggering section 841's mandatory life sentence if "the defendant continued to participate in drug activity after the conviction became final." App. at 60. The court's decision was anchored to its holding in *United States v. Lino*, 493 F.3d 41 (1st Cir. 2007).

In *Lino,* the First Circuit considered the defendant's claim that a prior conviction does not constitute "a distinct criminal episode" when the conviction "was based on one of the transactions that comprised the overarching [federally charged] conspiracy. . . ." *Id.* at 43. The court quoted its analysis from *United States v. DeJesus-Mateo*, 373 F.2d 70 (1st Cir. 2004), that just because the federal offense and the prior convictions "are related, part of a series, or part of a continuous course of criminal dealing, [this] *does not necessarily* render them a single episode." *Id.* (emphasis added). It ultimately held: "A prior drug conviction constitutes a 'distinct criminal episode' sufficient to trigger the enhancement so long as the

defendant continued to participate in drug activity after the conviction becomes final." *Id.*

The First Circuit's approach to assessing whether a prior conviction qualifies in *Pabon-Mandrell*, based on its analysis in *Lino*, conflicts with the courts' approaches to this same issue in *United States v. Johnston*, 220 F.3d 857, 862 (8th Cir. 2000), and *United States v. Hughes*, 924 F.2d 1354, 1361 (6th Cir. 1991). This conflict was recognized and explored in *United States v. Martino*, 294 F.3d 346 (2nd Cir. 2002). There, the defendant pled guilty to a federal indictment charging conspiracy to distribute marijuana from January 1, 1995, through December 12, 1998. *Id.* at 348. The defendant admitted being arrested in 1996 in possession of 200 pounds of marijuana which led to a conviction later that year. *Id.* On appeal, the defendant argued that his 1996 conviction did not qualify as a prior conviction triggering a ten year minimum mandatory sentence because "[i]t [d]efied logic to consider an offense which occurred in the middle of another offense as 'prior to' that second offense. . . ." *Id.* at 349.

The Second Circuit rejected the defendant's argument that Congress intended to apply the minimum mandatory sentence to "only those who have committed offenses completely independent of and prior to the conviction at hand." *Id.* at 349-50. It reasoned that had Congress intended this, it could have adopted specific language limiting such convictions to ones based on conduct "not part of the instant offense" as it did in limiting qualifying convictions for

criminal history under U.S.S.G. section 4A1.2(a)(1). *Id.* at 350. Turning to the question of whether the "prior conviction" must be one for which the underlying conduct is "entirely separate from the conduct underlying the conviction for which the defendant is currently being sentenced," *id.,* the court observed that the circuit courts that have addressed the issue have "unanimously concluded" that it "need not. . . ." *Id.* But, the court observed that the circuit courts have differed as to what must occur before a prior conviction may qualify a defendant for an enhanced mandatory minimum sentence: "All have determined, in other words, that some overlap between the acts that formed the basis of the prior conviction and the acts that form the basis of the present conviction is permissible, but how much provokes disagreement." *Id.*

Explicating this conflict, the court observed that "[t]he Fourth, Seventh, and Eleventh Circuits have held that 'it is . . . appropriate to focus on the degree of criminal activity that occurs after a defendant's conviction for drug-related activity is final rather than when the conspiracy began.'" *Id.* By contrast, "[t]he Sixth and Eighth Circuits . . . focus the inquiry on whether 'the convictions constitute [ ] separate criminal episodes for enhancement purposes under §841(b).'" *Id.* (quoting *Johnston* and citing *Hughes*). Joining the Fourth, Seventh, and Eleventh Circuits, the court in *Martino* held that the "dispositive question" is "whether or not the defendant ceased criminal activity after the prior conviction." *Id.*

Accord Pabon-Mandrell, App. 60; *Lino,* 493 F.3d at 43 (citing *Martino*).

Another case adopting the "separate criminal episodes" view of section 841's three strikes lifer provision (albeit in the slightly different context of determining whether two related prior convictions should be treated as one or two qualifying conviction(s)) is *United States v. Blackwood*, 913 F.2d 139 (4th Cir. 1990). The defendant was convicted of possession with intent to distribute crack cocaine in violation of 21 U.S.C. section 841(a)(1). He was sentenced to a mandatory life sentence based on two prior convictions, one arising from a 1981 arrest for possessing a large quantity of marijuana in a pickup truck, and the other arising from a search of the defendant's motel room, two hours later, during which an even greater quantity of marijuana was discovered. *Id.* at 144-5. These offenses were charged by separate indictments and were assigned separate criminal docket numbers, but were consolidated for trial and resulted in concurrent five year sentences. *Id.* Based on the fact that the state court viewed these two convictions as "no more than two components of a single act of criminality – 'defendant's possession with intent to sell marijuana within a limited geographical area and period of time,'" the defendant argued that the federal court should likewise construe them as a single conviction for purposes of section 841(b)(1)(A)(iii)'s three strikes lifer provision. *Id.*

Although the court acknowledged "some superficial appeal" to the government's "plain meaning" argument, it noted that it was contradicted by "a unanimous body of federal caselaw construing the apparently plain language of [18 U.S.C. App. § 1202(a) (predecessor to 18 U.S.C. § 924(e)),] a nearly identical federal sentencing enhancement statute." *Id.* (footnote omitted). The court observed that in *United State v. Petty*, 798 F.2d 1157 (8th Cir. 1986), the court agreed with the government's argument that the defendant's six previous convictions stemming from his simultaneous robbery of six individuals at a restaurant each qualified as previous convictions warranting the sentence enhancement applicable under section 1202(a). *Id.* at 146. Subsequently, upon this Court granting review, the Solicitor General reversed the government's stance and conceded that the Eighth Circuit in *Petty* had erred. *Id.* The court in *Blackwood* noted that every circuit that had subsequently considered the question adopted the government's revised view that "previous convictions" meant "previous criminal episodes that were distinct in time, rather than the multiple, 'literal' convictions that might result from a 'single spasm of criminal activity.'" *Id.* (citations omitted).

Comparing section 924(e)'s amendment with section 841's three strikes lifer provision, the court observed that although the legislative history was silent, *id.* at 147, it could either infer that Congress intended a substantive difference between this enhancement and section 924(e)'s or that in drafting

section 841(b)'s enhancement, Congress simply did not conceive the possibility that a court might "founder in the same type of confusion and 'error' that the Eighth Circuit committed in *Petty I* – and that Congress subsequently condemned." Accepting the latter inference, the court explained:

> "Although the language of section 841(b)'s enhancement appears to be "plain," it is no more so than was the language of section 924(e) before its "clarifying" amendment. Five courts of appeals, the Solicitor General, and, finally, Congress found "error" in the exactly analogous plain meaning argument that we now consider in the context of section 841(b). Because that reading would "thwart the clear legislative goals," . . . for section 841(b), we decline to lapse into analogous error and initiate a process of judicial and legislative tinkering similar to that which followed *Petty I*."

Id. Accord United States v. Powell, 404 F.3d 678, 682 (2nd Cir. 2005) (two prior drug convictions should be treated as one if underlying conduct part of single criminal episode: "Any other construction would be at odds with both the plain language of the statute – two means two – as well as with Congress' recognized goal in enacting mandatory minimum sentences for [only] recidivist drug offenders").[1]

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[1] Notwithstanding the support *Johnston*, *Hughes* and *Blackwood* lend to Pabon-Mandrell's argument, at least one

(Continued on following page)

The First Circuit's opinion in *Pabon-Mandrell*, based on its reasoning in *Lino*, determined whether Pabon-Mandrell's 2005 possession of cocaine (which the government alleged was an overt act of its federal narcotics conspiracy charge and presented evidence of it to prove the conspiracy), counted as a "prior conviction" by focusing on whether his criminal activity ceased after the prior conviction. App. 60. This approach appears to be followed by the Second, Seventh, Eleventh, and possibly Fourth Circuits. By contrast, the Sixth and Eighth Circuits, and at least the Fourth Circuit in *Blackwood*, focus on whether the offense conduct underlying the prior conviction constitutes a separate criminal episode from the federally charged narcotics offense or, instead, is part and parcel of, or comprised of, the same "single spasm of criminal activity" as the federal offense. Particularly, where the government *chooses* to charge a defendant's prior offense conduct as part of the federal drug offense, and offers evidence of it to win a conviction, it cannot be heard to complain that the prior conviction is really a "separate criminal episode" and constitutes a legitimate basis upon which the defendant should be sentenced as a three strikes lifer. Where this strategy choice rests solely with the government,

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court applying the "single criminal episode" test in the context of prior convictions charged as overt acts of a larger-in-scope federal drug offense has effectively rejected the argument that charging the prior conviction as such "waives" the right to seek a three strikes lifer sentence. *See United States v. Pace*, 981 F.2d 1123 (10th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993).

upholding this latter test would hardly "insulate the very career criminals the statute is designed to reach." *DeJesus-Mateo,* 373 F.3d at 74 (citation omitted). To resolve this significant conflict among the circuits that creates tremendous disparity in sentences among like offenders, this Court should review the decision below.

II. The First Circuit's Opinion Affirming Imposition of Section 841's Three Strikes Mandatory Life Provision Based Upon Prior Convictions for Two Minor Possessory Narcotics Offenses, is Based on an Interpretation of "Felony Drug Offense" That Produces an Absurd, and Perhaps Unconstitutional Result Contrary to Congressional Intent. The Decision Departs from the Accepted and Usual Course of Judicial Proceedings. Review Should be Granted to Correct This Errant Course Adopted by the Circuit Courts of Appeals and to Establish a Rational Interpretation That Will Ensure Sentences Proportionate to a Defendant's Narcotics-Related Criminal History.

By its opinion, the First Circuit has affirmed imposition of a severely harsh, life without release sentence upon a first time narcotics trafficking convict, based on two prior, minor possessory drug offenses. Not surprisingly, the district court voiced dissatisfaction with, and hinted at the irrationality of, being compelled to impose such a sentence "on an individual so young": "For me it is quite difficult to

think that a life in prison sentence has to be imposed, not needs to be, has to be imposed. . . ." App. 92. Given the relative insignificance of Pabon-Mandrell's narcotics-related criminal history, imposing this sentence "produces an absurd, and perhaps unconstitutional, result," *Green*, 490 U.S. at 527 (Scalia, J., concurring), that should be eschewed. Imposition of such a harsh sentence pursuant to section 841(b)(1)(A)'s three strikes lifer provision contradicts Congress' intent to reserve such sentences for only multiple recidivist narcotics traffickers committing the most serious narcotics offenses. This Court's review of the First Circuit's misguided opinion is vital to establish a rational interpretation of section 841(b)(1)(A)'s three strikes lifer provision that is consonant with Congressional intent.

This Court's caselaw construing statutory provisions like section 841(b)(1)(A)'s three strikes lifer sentence for which a literal interpretation may lead to an "absurd result" contrary to legislative intent, requires that a rational interpretation be sought. As this Court stated long ago in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892):

> "[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, make it unreasonable to believe that the

> legislator intended to include the particular act."

Id. at 459. Explaining this principle more recently and quoting one of this nation's most respected jurists, this Court stated in *Public Citizen v. United States Department of Justice*, 491 U.S. 400 (1989):

> Even though, as Judge Lerned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (CA 2), aff'd, 326 U.S. 404 . . . (1945). Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."

Id. at 454-5 (citation omitted). And in *Chapman v. United States*, 500 U.S. 453 (1991), Justice Stevens noted in dissent, "There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result. In fact, we have

specifically declined to do so in the past, even when the statute was not ambiguous, on the ground that Congress could not have intended such an outcome." *Id.* at 476 (footnote omitted). *See also Carachuri-Rosendo*, 130 S.Ct. at 2585-6 (rejecting government's "unorthodox" interpretation of "aggravated felony" to include a second minor possessory narcotics offense where the result is one "the English language tells us not to expect").

Unquestionably, by prescribing mandatory and enhanced sentences based on trafficking in exceedingly larger quantities of drugs, Congress intended to more severely punish the most serious and major narcotics traffickers. By the structure of Section 841(b)(1)(A)'s mandatory enhancement provisions, beginning with a mandatory minimum ten year sentence for defendants trafficking in significant, threshold quantities of controlled substances with no prior felony drug conviction, increasing to a mandatory minimum twenty year sentence with a maximum of life for defendants with one prior felony drug conviction, and finally increasing to a mandatory life sentence for defendants with two qualifying prior convictions, "Congress has mandated a progressive, incremental, 'stairstep' approach to punishment of repeat [narcotics trafficking] offenders." *United States v. Blackwood*, 913 F.2d 139, 147 (4th Cir. 1990); *accord United States v. Hughes*, 924 F.2d 1354, 1361 (6th Cir. 1991).

In *Chapman v. United States*, 500 U.S. 453 (1991), the Court considered the meaning of the phrase "mixture or substance containing detectable

amount" in determining the weight of LSD distributed in violation of Title 21, U.S.C. section 841(b)(1)(B)(v). Discerning section 841's legislative history, the dissenting Justices observed that "Congress intended to punish those who sell large quantities of drugs more severely than those who sell small quantities." *Id.* at 477 (Stevens, J. dissenting). Justice Stevens cited the House Committee Report: "The [House] Committee strongly believes that the Federal government's most intense focus ought to be on *major traffickers*, the manufacturers or the heads of organizations, who are *responsible for creating and delivering very large quantities of drugs*." *Id.* at n.14 (quoting H.R. Rep. No. 99-845, pp. 11-12 (1986)) (emphasis added).

Similarly, the Legislative History of Title V of the Bill that amended Part A – Controlled Substances Penalties, provides:

> "The purpose of Part A of Title V of the bill (sections 501-504) is to provide a more rational structure for the major drug trafficking offenses punishable under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.). . . . While it is appropriate that the relative dangerousness of a particular drug should have a bearing on the penalty for its importation or distribution, another important factor is the amount of the drug involved. Without the inclusion of this factor, penalties for *trafficking in especially large quantities* of extremely dangerous drugs are often inadequate."

Legislative history of P.L. 98-473 at pg. 255 (emphasis added). Consistently, Senator Boschwitz, describing some of the Act's provisions on the Senate floor, referred to section 6452 as a "three-time loser for dealers, with mandatory life sentences for third-time drug trafficking offenses." 134 Cong. Rec. S12637-01 (Sept. 15, 1988). *See also United States v. Rice*, 43 F.3d 601, 606 (11th Cir. 1995) (holding that courts should examine relationship between section 841(b)(1)(A) three strikes lifer predicate offenses to determine whether they constitute "single criminal episode" because to fail to do so would render enhancement "overbroad" and might unjustifiably subject defendants to "three-time loser" life sentence); *Blackwood,* 913 F.2d at 146 (quoting then-Senator Biden's remarks emphasizing need to ensure that career criminal's "rigorous sentencing provisions apply only as intended in cases meriting such strict punishment").

It is irrational to interpret section 841(b)(1)(A)'s three strikes lifer prior conviction prerequisite to apply to simple possessory offenses as the First Circuit affirmed in the decision below. Notwithstanding the obvious, legitimate intent to punish recidivists harshly, this interpretation goes well beyond. It results in persons with relatively insignificant drug-related criminal histories being sentenced to terms of imprisonment so severe – second only to death – that it extinguishes all hope and motivation for positive

prison behavior.[2] It ignores the expressed intent of this statute to apply *only* to the most serious narcotics traffickers, ones manufacturing, distributing, or dispensing large quantities that threaten large segments of our country's population. These are the offenders to whom Congress intended to apply this harsh sentencing provision. This is the narrow class of recidivists who merit such strict punishment.

The "absurdity" of this interpretation becomes apparent when the application of section 841(b)(1)(A)'s sentencing enhancement prerequisite is compared to other federal sentencing enhancements applicable to narcotics recidivists. For instance, in determining Pabon-Mandrell's Criminal History Category under the Sentencing Guidelines, a measure specifically formulated to increase punishment for recidivism, his two prior simple possession offenses did not result in any points. This is because they are "part of the relevant conduct in the instant offense." *See* U.S.S.G. 4A1.2, cmt. n.1 ("'Prior sentence' means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. . . . Conduct that is part of the instant

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[2] Although Pabon-Mandrell's first offense of possessing marijuana was a felony under Article 404 of Puerto Rico's Controlled Substances Act, it would have been a misdemeanor under Title 21, U.S.C. section 844(a). *See Carachuri-Rosendo*, 130 S.Ct. at 2581. Even his second offense of possessing cocaine, absent the government invoking Title 21, U.S.C. section 851 to seek punishment as a "simple possession recidivist," would have been classified a federal misdemeanor. *Id.* at 2587-90.

offense means conduct that is relevant conduct to the instant offense under the provisions of section 1B1.3."). Thus, though Pabon-Mandrell's criminal history has not qualified to enhance his sentence under the Sentencing Guidelines for recidivism, it has increased the minimum mandatory sentence he was eligible for under section 841 from ten years to life in prison.

Similarly, though Pabon-Mandrell was sentenced as a section 841(b)(1)(A) three time lifer, his prior minor, possessory offense convictions did not qualify him to be designated a Career Offender under U.S.S.G. section 4B1.1. Although one of the Career Offender prerequisites is that a defendant have at least two prior felony convictions for a controlled substance offense (or crime of violence), U.S.S.G. § 4B1.1(a), to be considered a qualifying "controlled substance offense," the prior conviction must be for violation of a federal or state law that prohibits "the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b). Clearly, Pabon-Mandrell's prior possessory offense convictions would not qualify.

Although the court below interpreted Pabon-Mandrell's prior convictions for minor possessory offenses to qualify him as section 841(b)(1)(A) three strikes lifer, they would not have qualified him for reclassification and mandatory life imprisonment as a three strikes "violent felon" under Title 18, U.S.C.

section 3559. To qualify as a predicate narcotics offense conviction for this enhancement, the prior convictions must be for "serious drug offenses. . . ." 18 U.S.C. § 3559(c)(1)(A)(ii). A "serious drug offense" is defined here as one punishable under Title 21, U.S.C. sections 841(b)(1)(A), 848, or 960(b)(1)(A), or an offense under state law that if it had been prosecuted federally, would have been punishable under the aforementioned statutes. 18 U.S.C. § 3559(c)(2)(H)(i), (ii). Pabon-Mandrell's prior possessory offenses would not have been punishable under the aforementioned sections of the federal Controlled Substances Act. *Cf.* 21 U.S.C. section 844 (penalties for simple possession).[3]

The "absurdity" of the First Circuit's interpretation of section 841(b)(1)(A)'s three strikes lifer prior conviction requirement is also apparent when

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[3] One might argue that, by describing the predicate convictions under section 841(b)(1)(A) as ones for generic "felony drug offenses," and not specifying "serious drug offenses" as Congress did for predicate convictions leading to enhancement under 18 U.S.C. section 3559, Congress manifested its intent that this enhancement be justified for recidivists with a history of less "serious" drug offense convictions. However, given the structure and legislative history of section 841(b)(1)(A) indicating an intent to punish more severely recidivist narcotics traffickers dealing in larger quantities of controlled substances, and the fact that the enhanced penalties under section 841(b)(1)(A)'s three strikes lifer provision and 18 U.S.C. section 3559 are the same, any blind adherence to the minor variation in the description of the predicate convictions between these two statutes is unwarranted and would lead to improper sentencing disparities between like offenses and offenders.

comparison is made to penalty enhancements under the Armed Career Criminal Act, 18 U.S.C. section 924(e). To earn this enhancement to a fifteen year minimum mandatory sentence, an offender must also have three previous convictions for "serious drug offenses punishable under federal law for a maximum term of ten years imprisonment or a similar term under state law." 18 U.S.C. section 924(e)(1), (2)(A)(i), (ii). Although the First Circuit affirmed Pabon-Mandrell's mandatory life sentence enhancement under section 841(b)(1)(A) based on his two prior convictions for minor possessory offenses, they would not have qualified him for enhancement under 18 U.S.C. section 924(e).

Not only does the First Circuit's interpretation of "felony drug offense" to include minor possessory offenses lead to absurd results, it potentially leads to unconstitutional results. The Eighth Amendment prohibits the infliction of cruel and unusual punishment upon persons convicted of a crime. This Court has interpreted this provision as limiting criminal punishment in three ways including prohibiting punishment "grossly disproportionate" to the severity of the offense. *See Solem v. Helm*, 463 U.S. 277, 284-8 (1983). To objectively evaluate a sentencing scheme for proportionality, a court must look to "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. Although the Court in *Solem* contemplated

that invalidation of a sentence under this analysis would be rare, *id.* at 290 n.16, it reversed the defendant's life without parole recidivist sentence as violative of the Eighth Amendment.

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), in upholding the petitioner's life without parole sentence for possessing more than 650 grams of cocaine against an Eighth Amendment challenge, divergent views regarding the scope of proportionality review emerged from this Court. Nonetheless, more recent cases demonstrate that at least narrow proportionality analysis is appropriate in reviewing particularly recidivist sentences against Eighth Amendment challenges. *See Ewing v. California*, 538 U.S. 11, 28-30 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003).

Notwithstanding the fact that this Court has upheld a life without parole sentence under a state law criminalizing the possession of 650 grams or more of cocaine, *Harmelin*, and 25-year-to-life and 50-year-to-life sentences under California's three strikes law, *Ewing, Lockyer,* Pabon-Mandrell maintains that the First Circuit's interpretation of section 841(b)(1)(A)'s three strikes lifer provision to apply to him based on his prior convictions for minor possessory drug offenses, is unconstitutionally disproportionate and quite possibly violative of the Eighth Amendment. As pointed out *supra*, though these prior drug offenses constituted felonies under Puerto Rico law, they did not qualify as felonies under federal law. Compare Title 21, U.S.C. section 841(a) with Title 21, section 844(a). They were relatively minor,

non-violent, victimless crimes. *See Solem*, 463 U.S. at 496-7. As also demonstrated *supra*, these prior convictions would not have qualified Pabon-Mandrell for sentencing enhancements under a host of other federal recidivist punishment schemes. *See id.* at 298-9. Of particular importance, the district court in sentencing Pabon-Mandrell expressed its own reservation that the life without release sentence it was obliged to impose upon him was too harsh for "an individual so young. . . ." App. 92.

This Court's well-established caselaw requires that, where a literal interpretation of a statutory provision may lead to an irrational or "absurd result," a rational one, consistent with legislative intent, must be sought. Where a federal narcotics offender's drug-related criminal history consists only of minor possessory offenses, Congress could not possibly have intended the imposition of a life without release sentence. Such a sentence contravenes the overall sentencing philosophy in this country that a court should impose the least severe sentence consistent with the need to reflect the seriousness of the offense, afford adequate deterrence, and protect the public from further crimes of the defendant. *See* Title 18, U.S.C. § 3553(a)(2). The interpretation adopted by the First Circuit fails to abide by these principles. Because its interpretation of section 841(b)(1)(A)'s three strikes lifer provision leads to an "absurd" result contrary to legislative intent, it has departed

from the accepted and usual course of judicial proceedings. For these reasons, review should be granted.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 08-1799

UNITED STATES OF AMERICA,
Appellee,

v.

GABRIEL RIVERA-RODRÍGUEZ,
Defendant, Appellant.

No. 08-1822

UNITED STATES OF AMERICA,
Appellee,

v.

EXCEL A. MUÑIZ-MASSA,
Defendant, Appellant.

No. 08-1828

UNITED STATES OF AMERICA,
Appellee,

v.

EDUARDO PABÓN-MANDRELL,
Defendant, Appellant.

No. 08-1960

UNITED STATES OF AMERICA,
Appellee,

v.

JOSÉ RIVERA-MORENO,
Defendant, Appellant.

No. 08-2143

UNITED STATES OF AMERICA,
Appellee,

v.

CHRISTIAN ARZOLA-MARTÍNEZ,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

[Hon. Aida M. Delgado-Colón, *U.S. District Judge*]

Before
Lynch, *Chief Judge*,
Torruella and Selya, *Circuit Judges*.

Anita Hill-Adames, for appellant Rivera-Rodríguez.

Raúl S. Mariani-Franco, for appellant Muñiz-Massa.

Rafael F. Castro-Lang, for appellants Pabón-Mandrell and Arzola-Martínez.

Rosa I. Bonini-Laracuente, for appellant Rivera-Moreno.

Luke V. Cass, Assistant United States Attorney, with whom *Rosa Emilia Rodríguez-Vélez*, United States Attorney, and *Nelson Pérez-Sosa*, Assistant United States Attorney, Chief, Appellate Division, were on brief for appellee.

August 25, 2010

TORRUELLA, *Circuit Judge.* Gabriel Rivera-Rodríguez ("Rivera-Rodríguez"), Excel Muñiz-Massa ("Muñiz-Massa"), Eduardo Pabón-Mandrell ("Pabón-Mandrell"), José Rivera-Moreno ("Rivera-Moreno"), and Christian Arzola-Martínez ("Arzola-Martínez"), (collectively "Appellants") were convicted by a jury of a drug trafficking conspiracy. Appellants were later sentenced to lengthy prison terms.

On appeal, Appellants challenge both their convictions and sentences. They advance a spate of claims in the process, including challenges to certain evidentiary rulings the district court made, challenges to the sufficiency of the evidence underlying their convictions, a challenge to the ex parte communications the district judge conducted with prospective jurors during voir dire, and challenges to the district court's sentencing process and outcomes. After careful

review of the record, we find that the district court did not abuse its discretion regarding the evidentiary rulings and that the evidence adduced at trial was sufficient for the jury to convict Arzola-Martínez, Muñiz-Massa, and Rivera-Moreno. We also find that the ex parte conversations the district judge held with prospective jurors, though troubling, did not amount to plain error. Moreover, we find that the district court did not err when it provided Arzola-Martínez with the opportunity to allocute during sentencing or when it found Rivera-Rodríguez individually responsible for at least 4.5 kilograms of crack cocaine. Finally, we find that the district court committed no error concerning the prior criminal histories of Arzola-Martínez or Pabón-Mandrell when calculating their sentences. Given our findings, we affirm in all respects.

I. Background and Procedural History

A. Indictment (2007)

On March 19, 2007, a grand jury sitting in the District of Puerto Rico returned a two-count indictment against the five Appellants and thirty-seven other individuals. Count One of the indictment charged that, between an unknown date ("but no later than in or about 2003") and 2007, the group of forty-two defendants conspired to possess with intent

to distribute and did distribute narcotics, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 860.[1]

B. Joint Trial and Appeal (2008)

Over the course of twelve days from February 11 to 27, 2008, Appellants were tried jointly. Appellants, witnesses, and the government referred to the drug trafficking organization of which Appellants were accused of being members as "Las Avispas" (in English, "The Wasps"). The original Las Avispas, Las Avispas Uno, operated in the Borinquen Ward of Guayama, Puerto Rico. After approximately forty-three members of Las Avispas Uno were arrested in 2002, the organization reconstituted itself in 2003 as Las Avispas Dos, also in the Borinquen Ward. Las Avispas Dos managed a drug distribution point, Las Vías, approximately 752 feet from the Luis Muñoz Elementary School ("the School"), which was operational at the time. Multiple witnesses testified at trial that Las Avispas Dos also operated a second drug distribution point, La Pluma.

At trial, the government presented evidence that Appellants were each active members, if not leaders, of Las Avispas Dos, which conspired to distribute heroin, cocaine, cocaine base (also known as crack cocaine), and marijuana. Evidence presented at trial

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[1] Count Two, relating to forfeiture of property upon a conviction under Count One, 21 U.S.C. § 853(a)(1) and (2), was dismissed at each Appellant's sentencing hearing.

also indicated that members of Las Avispas Dos, including some Appellants, (1) possessed firearms to ward off rival drug trafficking organizations and to maintain control over their drug distribution points and (2) killed and attempted to kill individuals to further intimidate and exert control. Among other things, the government specifically alleged that Rivera-Rodríguez and Muñiz-Massa, along with two indicted co-conspirators not appellants in this case, killed Ricardo Haddock-Collazo ("Haddock-Collazo"), on or about September 12, 2004, "since they believed he was providing information about the drug distribution organization to law enforcement authorities."

On the final day of the trial, the jury found each Appellant guilty as to Count One of the indictment. Furthermore, the jury unanimously agreed to the following findings, by proof beyond a reasonable doubt: (1) all Appellants conspired to possess with the intent to distribute fifty grams or more of a mixture or substance containing cocaine base (crack); (2) Muñiz-Massa, Pabón-Mandrell, and Rivera-Moreno conspired to possess with the intent to distribute one kilogram or more of a mixture or substance containing a detectable amount of heroin; (3) Arzola-Martínez and Rivera-Rodríguez conspired to possess with the intent to distribute less than one hundred grams of a mixture or substance containing a detectable amount of heroin; (4) all Appellants conspired to possess with the intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine; (5) Muñiz-Massa, Pabón-Mandrell, Rivera-Moreno,

and Rivera-Rodríguez conspired to possess with the intent to distribute one hundred kilograms or more of a mixture or substance containing a detectable amount of marijuana; (6) Arzola-Martínez conspired to possess with the intent to distribute less than one hundred kilograms of a mixture or substance containing a detectable amount of marijuana; and (7) all Appellants were involved in conspiracy and drug distribution activities that took place within 1,000 feet of a public and/or private school.

Appellants were sentenced between May and July of 2008. On May 20, the district court sentenced Rivera-Rodríguez to a term of imprisonment of forty-three years followed by a term of supervised release of fifteen years. On May 30, the district court sentenced Muñiz-Massa to a term of imprisonment of sixty years followed by a term of supervised release of fifteen years. On June 6, the district court sentenced Pabón-Mandrell to a term of imprisonment for the remainder of his natural life followed by a term of supervised release of ten years. On June 25, the district court sentenced Rivera-Moreno to a term of imprisonment of thirty-five years followed by a term of supervised release of fifteen years. Finally, on July 28, the district court sentenced Arzola-Martínez to a term of imprisonment for the remainder of his natural life followed by a term of supervised release of fifteen years.[2]

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[2] In the companion cases of *United States v. Cintrón-Echautegui*, 604 F.3d 1 (1st Cir. 2010), and *United States v.*

(Continued on following page)

Between May and August of 2008, each Appellant filed his timely notice of appeal. Each Appellant raises multiple issues on appeal.[3] First, we address challenges by Arzola-Martínez, Muñiz-Massa, and Rivera-Moreno to the district court's evidentiary rulings. Second, we consider the argument made by these three Appellants that the evidence presented at trial was insufficient for a jury to find them guilty beyond a reasonable doubt. We then consider, under plain error review, whether the ex parte conversations that the district judge held with prospective jurors violated Appellants' Sixth Amendment rights.

Rivera-Moreno, No. 08-1961, 2010 U.S. App. LEXIS 14677 (1st Cir. July 19, 2010), two co-conspirators in Las Avispas Dos pled guilty to the conspiracy count, and we affirmed the district court's judgments in each case.

[3] Besides the issues discussed here, Arzola-Martínez, Pabón-Mandrell, and Rivera-Rodríguez raised, in their initial brief, another issue, concerning the number of peremptory challenges the district court granted to the prosecution at trial. These Appellants argued that the district court committed plain error when it granted the prosecution twelve peremptory challenges, which these Appellants argued violated Federal Rule of Criminal Procedure 24(b)(2). These Appellants thus requested that we find that the district court committed plain error and grant them a new trial. In supplemental appellate briefing that we ordered both parties to submit after oral argument, the government noted that, during a supplemental conference with the district court on March 12, 2010, "[t]he district court and the trial attorneys (both for the government and defense) clarified that although the record says '12' only six (6) peremptory challenges were given to the government with two challenges for the 3 alternates." Appellants conceded the point during that conference, and so we do not address this issue further.

Finally, we evaluate various issues raised concerning the sentencing of Arzola-Martínez, Rivera-Rodríguez, and Pabón-Mandrell.

II. Discussion

A. Evidentiary Rulings

On appeal, Arzola-Martínez, Muñiz-Massa, and Rivera-Moreno claim that the district court made several erroneous evidentiary rulings at trial. We disagree. We conclude that the district court did not abuse its discretion in making the evidentiary rulings at issue.

1. Standard/Scope of Review

We review a district court's evidentiary rulings and *Brady* determinations for abuse of discretion. *United States v. DeCologero,* 530 F.3d 36, 65 (1st Cir. 2008); *United States v. Walter,* 434 F.3d 30, 33 (1st Cir. 2006). We review *de novo* "whether the strictures of the Confrontation Clause have been met." *Walter,* 434 F.3d at 33 (quoting *United States v. Vega Molina,* 407 F.3d 511, 522 (1st Cir. 2005)) (internal quotation marks omitted). "Only rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *Freeman v. Package Mach. Co.,* 865 F.2d 1331, 1340 (1st Cir. 1988).

2. Analysis

a. Arzola-Martínez

Arzola-Martínez claims that the district court erred when it allowed the prosecution to present, as evidence of his membership in the conspiracy, a firearm and narcotics the police seized during separate arrests that he argues were unconnected to, even if they were contemporaneous with, the charged conspiracy. Arzola-Martínez argues that no evidence linked these events to the charged conspiracy, so admission of these events was improper character evidence under Rule 404(b) and prejudicial under Rule 403.

Víctor Javier Veguilla-Figueroa ("Officer Veguilla-Figueroa"), a member of the Puerto Rico Police Department ("PRPD"), testified that, around 9:00 p.m. on October 13, 2005, a date which fell within the time frame of the charged conspiracy, he and two other PRPD police officers performing surveillance in Guayama received a communication over their radio that three individuals in a particular vehicle were armed and had threatened someone. Officer Veguilla-Figueroa stated that he and his colleagues identified and pursued the car, which initially refused to stop. When the vehicle finally did stop, Officer Veguilla-Figueroa placed the driver, Arzola-Martínez, under arrest and searched him, seizing a firearm.

José A. Ortiz-Reyes ("Officer Ortiz-Reyes"), another PRPD member, testified that, around 2:20 p.m. on April 24, 2006, he and a fellow PRPD police officer

performing preventive patrolling in Guayama observed a particular vehicle almost negligently collide with a second vehicle. Officer Ortiz-Reyes indicated to the driver of the first vehicle that he should stop. Instead, the vehicle fled, and Officer Ortiz-Reyes chased it. After the vehicle finally did stop, Officer Ortiz-Reyes approached it and observed on the back floor rug behind the seat of the passenger, whom Officer Ortiz-Reyes identified as Arzola-Martínez, a plastic ziplock bag containing plastic vials filled with powder that later tested positive for cocaine. The police then arrested Arzola-Martínez and the vehicle's driver.

The police retrieved the gun from Arzola-Martínez, who possessed the weapon during the time and in the vicinity of the drug conspiracy. The police retrieved the narcotics from a car in which Arzola-Martínez was a passenger during the time and in the vicinity of the drug conspiracy. We have previously found that the presence of firearms and narcotics is probative of an intent to distribute narcotics. *See United States v. Rivera Calderón,* 578 F.3d 78, 94 (1st Cir. 2009) (holding that a gun retrieved by police from a defendant who possessed the gun during the time and in the vicinity of a drug conspiracy "clearly was relevant evidence" and made it more probable that the defendant was a member of this particular conspiracy because, "in drug trafficking[,] firearms have become 'tools of the trade' and thus are probative of the existence of a drug conspiracy." (citation and internal quotation marks omitted)); *see also United*

States v. Cannon, 589 F.3d 514, 518-19 (1st Cir. 2009). Because the events to which Officer Veguilla-Figueroa and Officer Ortiz-Reyes testified occurred at the time and in the vicinity of the conspiracy, and also because the evidence confiscated included "tools of the trade" used in the conspiracy, the district court did not abuse its discretion in admitting the testimonies of Officer Veguilla-Figueroa and Officer Ortiz-Reyes as relevant to Arzola-Martínez's role in the conspiracy.

b. Muñiz-Massa

As we discuss below, the district court did not abuse its discretion in making its rulings related to the first three of four evidentiary rulings Muñiz-Massa claims were erroneous, and we need not reach the fourth.

First, Muñiz-Massa claims that the district court erred when it prevented him from fully cross-examining the criminal histories of Carlos Brito-Pacheco ("Brito-Pacheco") and José Rivera-Díaz ("Rivera-Díaz"), the government's two cooperating witnesses, for the purpose of impeaching them as witnesses against him. Muñiz-Massa argues that the district court's evidentiary ruling that prevented the defense from effectively cross-examining the government's two main witnesses as to their prior convictions and arrests unfairly infringed Muñiz-Massa's Confrontation Clause right under the Sixth Amendment.

We have previously noted that

> the right to cross-examination is not unbridled. So long as the trial court affords the defendant a fair opportunity for effective cross-examination, it may impose reasonable restrictions based on concerns such as undue prejudice, confusion of the issues, witness badgering, redundancy, or questioning that appears to be of marginal relevance. The trial court's latitude in shaping such restrictions is "wide."

United States v. Molina, 407 F.3d 511, 523 (1st Cir. 2005) (internal citation omitted). Specifically, as relevant to Muñiz-Massa's claim, we have observed that district courts may exercise discretion in restricting a defendant's impeachment of a witness against him by limiting cross-examination of that witness's prior conduct. *See United States v. Bunchan,* 580 F.3d 66, 71 (1st Cir. 2009) (finding no abuse of discretion in the district court's restriction of appellant's cross-examination regarding criminal charges pending against a witness where the district court found reference to the nature of the charged crime too prejudicial under Federal Rule of Evidence 403); *see also* Fed. R. Evid. 403; Fed. R. Evid. 608.

At one point during cross-examination, defense counsel sought to show that Brito-Pacheco was in prison in 2004 and so could not have had first-hand knowledge of events concerning Las Avispas Dos during a portion of the time to which he testified. In front of the jury, defense counsel asked Brito-Pacheco

if it was true that, after his release from prison on June 16, 2003, he was "sent back to jail because [he] did not comply with the conditions [of his probation], right?" On the government's objection that defense counsel's suggestion was not in good faith (because the government claimed the defense counsel knew that Brito-Pacheco was not, in fact, sent back to jail for violating the conditions of his probation) and would leave the jury with an incorrect impression about when Brito-Pacheco was incarcerated, the district court determined that Brito-Pacheco was, in fact, imprisoned from September 2002 to June 2003 and again from September 2005 through and including his testimony at trial in February 2008, and so was "out on the streets" in 2004.[4] After this review of Brito-Pacheco's criminal history, the defense counsel acknowledged "[t]hat clears it up Your Honor" and that he had "no problem with that." At a later point during cross-examination, defense counsel, Brito-Pacheco, the district court, and the government engaged in the following dialogue:

> [Defense counsel]: I would like to get a chronology of your arrests, convictions, revocations. You were first arrested back in the year 2000 what?
>
> [Brito-Pacheco]: 2002

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[4] The record is not clear about the nature of these two arrests and convictions. We can only glean that they were related to weapons charges.

> [Defense counsel]: Was that a drug charge?
>
> [The government]: Objection, and we object as to the line of questioning being asked and answered as to the specific –
>
> [The court]: The objection goes as to the nature of the charges. There has been testimony as to the arrests and sentences.

While Muñiz-Massa claims in his appellate brief that, at this point, the trial court "prevented defense counsel from cross-examining the nature of the prior criminal charges presented against Brito-Pacheco," it is clear from the record that the trial court made no ruling either way on the government's objection and defense counsel did not seek to clarify or otherwise pursue the matter at trial. Instead, the district court permitted defense counsel, uninterrupted, to establish for the jury the dates during which Brito-Pacheco was incarcerated in order to make the point, in front of the jury, that Brito-Pacheco had "no personal knowledge of anything that occurred in this case after September of 2005." We thus find that the district court allowed Muñiz-Massa "a fair opportunity for effective cross-examination" of Brito-Pacheco.

With respect to Rivera-Díaz, defense counsel attempted to question the witness about whether he qualified for a reduction in the range of his sentencing

for a previous arrest.[b] Rivera-Díaz responded during the cross-examination that he did not qualify for the sentence reduction. The defense counsel then sought to admit Rivera-Díaz's plea agreement about the prior arrest as an exhibit and to ask Rivera-Díaz why he did not qualify for the sentence reduction. On the government's objection that the prior conviction did not entail truthfulness or dishonesty, the district court stated that it would not permit defense counsel's further questioning on the matter. The district court stated that the defense counsel's line of questioning was not in good faith because the attorney already knew that Rivera-Díaz did not qualify for the sentence reduction, and the exhibit could only mislead the jury into thinking otherwise.

In another instance, defense counsel asked Rivera-Díaz to explain the criminal history category listed on his plea agreement. Rivera-Díaz responded that he could not explain the concept. On the government's objection to defense counsel continuing the line of questioning, the district court asked defense counsel to explain where the questioning was leading. Defense counsel responded that he intended to elicit from Rivera-Díaz that the criminal history category is based on the record of conviction and then to ask the witness about his prior conviction and government cooperation. The district court precluded the line of

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[b] The record is not clear about the nature of this arrest. Defense counsel stated that it was for larceny but noted that Rivera-Díaz said it was drug-related.

questioning because it concluded that the questioning was not to be used to explain the legal principles involved in various criminal history categories, as defense counsel claimed, but rather to introduce, indirectly, the witness's prior criminal convictions that were otherwise inadmissible. In sum, the district court, through the application of Federal Rule of Evidence 608(b) and the balancing required by Federal Rule of Evidence 403, determined that cross-examination of the prior criminal conduct of Rivera-Díaz in these two instances was prohibited.

As in *Bunchan, see id.* at 71, and as Muñiz-Massa acknowledges, the district judge did permit other cross-examination of each witness. Both witnesses were cross-examined on their drug sales and usage, and Brito-Pacheco was also cross-examined on the fact of his imprisonment from 2002 to 2003 and from 2005 until his testimony at trial and on his cooperation with the government in 2006. Any restriction of Muñiz-Massa's Confrontation rights was thus reasonable.

Second, Muñiz-Massa contends that the district court erred when it allowed the government to present witness testimony through the use of leading questions. Muñiz-Massa argues that, at one point during cross-examination, Rivera-Díaz listed the members of Las Avispas but did not mention Muñiz-Massa, saying, after naming fourteen members, that he did not "recall anybody else[ ] right off the top of my head." Muñiz-Massa argues that the prosecutor then, on redirect examination, had to lead the witness

to elicit a response that included Muñiz-Massa in the membership of Las Avispas Dos. The prosecutor asked Rivera-Díaz "what were the different roles of the members of Las Avispas, that you see here today?" The district court overruled defense counsel's objection that the question went beyond his cross-examination, stating that, although defense counsel had not specifically inquired about the roles of Las Avispas Dos members, because Rivera-Díaz provided a description of roles in cross-examination from other attorneys, the district judge would allow the testimony. After the prosecutor asked "out of the members of Las Avispas that are present here in court, what are their different roles?," Rivera-Díaz then identified Muñiz-Massa as a "pusher," or "seller," at Las Vías.

In another instance, when the government asked Rivera-Díaz to "identify which members of Las Avispas actually carried firearms with them," Rivera-Díaz did not include Muñiz-Massa in the list. The government then asked Rivera-Díaz: "Are you aware of any of the members of Las Avispas that you have identified here in court today, that used to carry firearms?" Defense counsel objected, stating that the prosecution "is trying to jiggle the witness recollection." The district court overruled the objection, stating "[t]he government may refresh his recollection, with a document or statements or asking him to look around. . . . [T]his morning we had to take a break because [Rivera-Díaz] had not eaten. So the government is entitled to probe, and refresh other things for this witness." The government then asked

Rivera-Díaz: "[L]ooking around in the courtroom and out of the members of Las Avispas that you have identified that are present here in court, are you aware if any of them used to carry firearms?" Rivera-Díaz then identified, among others, Muñiz-Massa.

We have found that any error in the prosecution's use of leading questions is harmless where there is no evidence that the leading questions prompted inaccurate testimony. *See United States v. De León-Quiñones*, 588 F.3d 748, 756-57 (1st Cir. 2009). Here, the district court explained that it would permit the questions over defense counsel's objections because they were designed to elicit further information to which the witness previously testified and also because they were used to refresh recollection. Two days before both of the incidents described above, Rivera-Díaz had identified Muñiz-Massa as a "seller" for Las Avispas Dos who "always had the pistol on him and he was always hanging out with [Rivera-Rodríguez]." That testimony is consistent with Rivera-Díaz's testimony, in response to leading questions, two days later about Muñiz-Massa's membership in Las Avispas Dos and gun possession. We thus conclude that any error in allowing these leading questions was harmless and that there is no evidence that they prompted inaccurate testimony.

Third, Muñiz-Massa argues that the district court erred when it admitted the testimony of Brito-Pacheco, a cooperating witness, about Muñiz-Massa's alleged admission that he participated in Haddock-Collazo's murder. Specifically, Muñiz-Massa claims

that the government failed to disclose his inculpatory admission to the defense before the government presented Brito-Pacheco's testimony at trial. Muñiz-Massa argues that this disclosure was required pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny, which held that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." *Richardson v. Marsh*, 481 U.S. 200, 207 (1987) (citing *Bruton*, 391 U.S. at 135-36). However, although Muñiz-Massa objected at trial to Brito-Pacheco's testimony about Muñiz-Massa's admission on hearsay grounds, Muñiz-Massa did not object on *Bruton* grounds. Muñiz-Massa thus waived any objection to this matter by not raising it at trial. *See Campos-Orrego v. Rivera*, 175 F.3d 89, 95 (1st Cir. 1999) ("We have reiterated, with a regularity bordering on the echolalic, that a party's failure to advance an issue in the *nisi prius* court ordinarily bars consideration of that issue on appellate review."). Furthermore, even if Muñiz-Massa had raised this matter at trial, *Bruton* is inapplicable because the statement in question was his own, not that of a codefendant. The district court thus did not err in admitting Brito-Pacheco's testimony about Muñiz-Massa's alleged admission.

Finally, Muñiz-Massa contends that the district court erred when it admitted photographic evidence of Haddock-Collazo's murdered body. Rule 403 gives

trial courts broad discretion to reject evidence when its probative value is *substantially outweighed by* the danger of *unfair* prejudice. Fed. R. Evid. 403; *see also United States v. Smith,* 292 F.3d 90, 99 (1st Cir. 2002). In a prosecution alleging that the defendants participated in a murder, the district court may conclude that photographic evidence of the murder helps the jury understand the nature and severity of the charged conduct and is not unfairly prejudicial. *See United States v. Cartano,* 420 F.2d 362, 364-65 (1st Cir. 1970); *see also, e.g., United States v. Greatwalker,* 356 F.3d 908, 912-13 (8th Cir. 2004). Even if the district court abused its discretion here, which we seriously doubt, any purported error was harmless in light of the other overwhelming evidence against Muñiz-Massa. *See United States v. Hicks,* 575 F.3d 130, 143 (1st Cir. 2009) ("We review non-constitutional evidentiary errors for harmlessness; an error is harmless if it is 'highly probable that the error did not influence the verdict.'" (citation omitted)).

c. Rivera-Moreno

Rivera-Moreno claims that the government violated his rights protected by *Brady v. Maryland,* 373 U.S. 83 (1963), when it failed to disclose the allegedly exculpatory testimony Rivera-Díaz provided during sentencing, which Rivera-Moreno claims contradicted testimony Rivera-Díaz provided during trial. Rivera-Moreno's claim concerns testimony Rivera-Díaz provided in an interview with a probation officer

during the preparation of Rivera-Moreno's Presentence Investigation Report ("PSR").

Rivera-Moreno concedes that "[t]he government's obligations under *Brady* only extend to information in its possession, custody, or control." *United States v. Hall*, 434 F.3d 42, 55 (1st Cir. 2006). Nevertheless, Rivera-Moreno contends that the government had a duty to learn and disclose the details of Rivera-Díaz's sentencing-related testimony. That, however, is not the law. "While a prosecutor must disclose information maintained by government agents even if the prosecutor herself does not possess the information, this duty does not extend to information possessed by government agents not working with the prosecution." *Id.* (internal citations omitted). Rivera-Díaz's sentencing-related testimony was maintained by the probation officer preparing the PSR, and there is no evidence that the federal prosecutor or any agent working on the U.S. Attorney's behalf had this information prior to or during trial. Accordingly, the government committed no *Brady* violation.

B. Sufficiency of the Evidence

At the close of the government's case-in-chief, Arzola-Martínez, Muñiz-Massa, and Rivera-Moreno each filed a timely motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(a) ("Rule 29 motion"). The district court denied each of these motions and proceeded with closing arguments before submitting the case to the jury. On appeal,

these three Appellants, although not challenging whether a drug conspiracy existed, claim that the evidence presented at trial was insufficient for a jury to find them guilty of participating in it.[6] These three Appellants thus request that we reverse their convictions and remand their cases to the district court for a new trial. We decline to do so. In this section, we consider whether the evidence discussed in the previous section, along with other evidence, could have led a reasonable jury to find each of these three Appellants guilty beyond a reasonable doubt of the conspiracy charged. We conclude that a reasonable jury could find Appellants guilty beyond a reasonable doubt.

1. Standard/Scope of Review

We review the denial of a Rule 29 motion for judgment of acquittal *de novo*. *Troy*, 583 F.3d at 24. In so doing,

> we examine the evidence, both direct and circumstantial, in the light most favorable to the jury's verdict. We do not assess the credibility of a witness, as that is a role reserved

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[6] Arzola-Martínez and Muñiz-Massa also attack the credibility of witnesses who testified at trial as a basis for finding that the evidence was insufficient for a jury to find them guilty. However, "[w]e do not assess the credibility of a witness, as that is a role reserved for the jury." *United States v. Troy*, 583 F.3d 20, 24 (1st Cir. 2009) (citation and internal quotation marks omitted). We thus need not consider this matter.

> for the jury. Nor need we be convinced that the government succeeded in eliminating every possible theory consistent with the defendant's innocence. Rather, we must decide whether that evidence, including all plausible inferences drawn therefrom, would allow a rational factfinder to conclude beyond a reasonable doubt that the defendant committed the charged crime.

Id. (internal citations and quotation marks omitted).

"We have described this standard of review as 'formidable,' and defendants challenging convictions for insufficiency of evidence face an uphill battle on appeal." *United States v. Lipscomb,* 539 F.3d 32, 40 (1st Cir. 2008) (internal citation, quotation marks, and brackets omitted). We have repeatedly emphasized, however, that, "despite the prosecution-friendly overtones of the standard of review, appellate oversight of sufficiency challenges is not an empty ritual." *United States v. de la Cruz-Paulino,* 61 F.3d 986, 999 n.11 (1st Cir. 1995) (citation and quotation marks omitted).

2. Legal Framework

Appellants were charged with participating in a conspiracy to distribute drugs. We have previously found that,

> [t]o establish that a conspiracy existed, the government had to prove beyond a reasonable doubt that each defendant knowingly

> and voluntarily agreed with others to commit a particular crime. Such an agreement may be express or tacit, that is, represented by words or actions, and may be proved by direct or circumstantial evidence.

Rivera-Calderón, 578 F.3d at 88-89 (citations omitted); *United States v. Famania-Roche,* 537 F.3d 71, 78 (1st Cir. 2008). "To establish that the defendants belonged to and participated in the drug conspiracy, the government must show two kinds of intent: intent to agree and intent to commit the substantive offense." *United States v. Bristol-Mártir,* 570 F.3d 29, 39 (1st Cir. 2009) (citation and internal quotation marks omitted). We have also previously observed that "[u]nder established case law, members of a conspiracy are substantively liable for the foreseeable criminal conduct of the other members of the conspiracy." *United States v. Hurley,* 63 F.3d 1, 22 (1st Cir. 1995) (citing *Pinkerton v. United States,* 328 U.S. 640 (1946)). However, "the government need not show that the conspirators knew all the details of the conspiracy." *United States v. Orrego-Martínez,* 575 F.3d 1, 8 (1st Cir. 2009) (citation and internal quotation marks omitted).

3. Analysis

a. Arzola-Martínez

Arzola-Martínez argues that evidence of what he claims were merely "occasional" sales of "small" amounts of cocaine to Rivera-Rodríguez was

insufficient to warrant his conviction as a conspirator of Las Avispas Dos or to establish a violation of 21 U.S.C. § 860. Arzola-Martínez contends that the prosecution did not establish that he had a stake in the success of the retail sales made by the drug organization at the housing project or in its profits. Furthermore, Arzola-Martínez argues that, because there was no evidence that Arzola-Martínez sold cocaine to Rivera-Rodríguez near the School, the evidence was insufficient to convict him under 21 U.S.C. § 860.

Arzola-Martínez's arguments miss the mark. We find that sufficient evidence was presented at trial for a rational jury to conclude beyond a reasonable doubt that Arzola-Martínez was a conspirator of Las Avispas Dos and to establish his violation of 21 U.S.C. § 860. First, a former member of both Las Avispas Uno and Dos, Brito-Pacheco, testified that Arzola-Martínez was a member of Las Avispas Dos with whom he would "sell drugs" and "shoot" people. Brito-Pacheco further testified that Arzola-Martínez "quite frequently" sold cocaine in the Borinquen Ward to Rivera-Rodríguez in order for Rivera-Rodríguez to manufacture crack because the crack "sells alot [sic] and makes alot [sic] of money."

Second, as discussed above, Officer Veguilla-Figueroa testified that when he arrested Arzola-Martínez in 2005, Officer Veguilla-Figueroa seized a firearm from him. Third, also as discussed above, Officer Ortiz-Reyes testified that in 2006 Arzola-Martínez was a passenger in a car in which the police

found plastic vials of a substance later shown to contain cocaine. A search of the vehicle conducted in the presence of both Arzola-Martínez and the driver also uncovered in the front glove compartment $468 in cash, which Arzola-Martínez told Officer Ortiz-Reyes belonged to him.

We find that this direct and circumstantial evidence was sufficient to convict Arzola-Martínez of Count One. The testimony of these three witnesses about Arzola-Martínez's role, relationships, and activities in Las Avispas Dos was sufficient for a reasonable jury to conclude that Arzola-Martínez knowingly and voluntarily agreed with others to participate in Las Avispas Dos's drug-related activities. A reasonable jury could conclude from Brito-Pacheco's testimony that Arzola-Martínez was a member of Las Avispas Dos who engaged in drug dealing, shooting people, and supplying cocaine to Rivera-Rodríguez. A reasonable jury could infer from the testimony of Officer Veguilla-Figueroa and Officer Ortiz-Reyes that the firearm, cocaine, and cash they found on or with Arzola-Martínez were related to his participation in Las Avispas Dos. Not only, as discussed above, have we previously found the presence of drugs and guns to be probative of an intent to distribute narcotics, but we have also found lesser sums than that with which Arzola-Martínez was found to be "substantial amounts [of cash]" that, when discovered near narcotics in a vehicle, "support the inference that the car's occupants were engaged

in the sale, rather than casual use, of drugs." *Cannon*, 589 F.3d at 518.

In order to convict Arzola-Martínez of the charged conspiracy, the government need not have established that Arzola-Martínez sold cocaine at a particular frequency or of a certain amount, or that he had a personal stake in the success of Las Avispas Dos's sales or profits. Rather, the government only had to prove that he was a member of the conspiracy and that the sales and profits were reasonably foreseeable to him. As discussed above, the government met that burden.

The government, moreover, need not have established that Arzola-Martínez himself sold cocaine near the School, again so long as the government proved he was a member of the conspiracy and the location of those sales was reasonably foreseeable to him. According to a former member of Las Avispas Uno and Dos, Rivera-Díaz, Las Avispas Dos members would prepare crack in a house adjacent to the School. As discussed above, Las Vías, a drug distribution point Las Avispas Dos managed, was located approximately 752 feet from the School.

b. Muñiz-Massa

Muñiz-Massa claims that the evidence was "insufficient to show [his] knowledge and/or participation in" the conspiracy. In particular, Muñiz-Massa alleges that "it was never clear on the record whether

he was associated and part of the 'Las V[í]as' or 'La Pluma' drug organization or both."

At trial, cooperating witness Brito-Pacheco testified that, like Arzola-Martínez, Muñiz-Massa was a member of Las Avispas Dos with whom he would "sell drugs" and "shoot" people. Brito-Pacheco specified that Muñiz-Massa sold drugs and was a "runner"[7] for Las Avispas Dos. Brito-Pacheco further testified that Muñiz-Massa was his partner in selling drugs in order to "keep an eye on each other and to make money [for] both of us." Brito-Pacheco also stated that Muñiz-Massa told him that, in September 2004 and in furtherance of the charged conspiracy, Muñiz-Massa, along with Rivera-Rodríguez and three others, killed Haddock-Collazo, whom they suspected of cooperating with law enforcement's investigation of Las Avispas Dos. Brito-Pacheco helped dispose of the body. In his testimony at trial, Charles Alvarado-Dávila, a member of the PRPD, corroborated Brito-Pacheco's description of the date on which, and the location where, Haddock-Collazo's body was found, its condition, and, also consistent with Brito-Pacheco's testimony, that the body had been moved between two locations. At trial, a forensic pathologist testified that, through an autopsy she performed on his body, she determined Haddock-Collazo's cause of death to

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[7] Rivera-Díaz testified that a runner "is in charge of keeping the material in his house to then bring it over to the drug point and hand it over to the seller, and then to collect the monies and keep it for the owner of the material."

be from "severe head trauma." This testimony was consistent with the description of the murder about which Brito-Pacheco testified that Muñiz-Massa had told him.

Rivera-Díaz testified that, during the course of and related to the charged conspiracy, he saw Muñiz-Massa carry firearms. Rivera-Díaz stated that Muñiz-Massa "would sell for [Las Avispas Dos]. . . . He always had the pistol on him and he was always hanging out with [Rivera-Rodríguez]."

We find that this evidence was sufficient to convict Muñiz-Massa. The testimony of these four witnesses about Muñiz-Massa's role, relationships, and activities in Las Avispas Dos was sufficient for a reasonable jury to conclude that Muñiz-Massa knowingly and voluntarily agreed with others to participate in Las Avispas Dos's drug-related activities, engaged in drug dealing and, in furtherance of the conspiracy, violently confronted other people whom Muñiz-Massa perceived as a threat to the organization.

As discussed above, multiple witnesses testified at trial that the single Las Avispas Dos organization operated two drug distribution points, called Las Vías and La Pluma. Las Avispas Dos -- and not Las Vías and La Pluma – was the organization of which Muñiz-Massa and others were charged with being members. The jury could have reasonably concluded that Las Vías and La Pluma, both areas in the Borinquen Ward of Guayama, were merely locations

of Las Avispas Dos's operations. The government need only to have proven beyond a reasonable doubt that Muñiz-Massa was involved in Las Avispas Dos, irrespective of his involvement in a particular drug distribution point, and it did just that.

c. Rivera-Moreno

Rivera-Moreno claims that the record lacked "any evidence or a reliable inference from any evidence to establish any intent or partial intent to enter into an agreement" sufficient to convict him of the charged conspiracy. We find otherwise.

According to Rivera-Díaz's testimony at trial, in 2003, he and other former members of Las Avispas Uno, including Rivera-Moreno (Rivera-Díaz's brother-in-law), met to discuss the establishment, management, and operation of Las Avispas Dos. Rivera-Díaz testified that, because Rivera-Moreno "was the runner for the owner of [Las Avispas Uno] . . . and he knew who to buy the drugs or heroin from," the group decided that Rivera-Moreno would "stay in charge" of Las Avispas Dos, which meant he would "be the owner of the [drug distribution] point." Rivera-Díaz also testified that Rivera-Moreno would obtain heroin from a contact and then pass it along to other members of Las Avispas Dos who served as runners and distributors. Rivera-Díaz further testified to Rivera-Moreno's leadership role in Las Avispas Dos when the former stated that the latter "ordered" Las Avispas Dos members "not to sell on Holy Friday" and that

the runner of heroin for Las Avispas Dos would give to Rivera-Moreno $9.00 of the $10.00 cost of each of 800 to 900 packages of heroin sold during each of three shifts per day.

A second cooperating witness, Brito-Pacheco, corroborated Rivera-Díaz's testimony about Rivera-Moreno's participation in Las Avispas Dos, including Rivera-Moreno's role as the organization's heroin supplier. As he had done with Arzola-Martínez and Muñiz-Massa, Brito-Pacheco testified that he would "sell drugs" and "shoot" people with Rivera-Moreno.

A third witness, César Alicea-Léon ("Alicea-Léon"), testified that, between 2003 and 2006, he distributed "large amounts" of heroin to Rivera-Moreno, whom Alicea-Léon stated "was in charge" of the drug distribution point in the Borinquen Ward.

A fourth witness, Roberto Ayala-Vega ("Officer Ayala-Vega"), who worked in the PRPD's Tactical Division from 2005 to 2007, testified that on or about November 4, 2006 he was patrolling the Borinquen Ward when Rivera-Moreno and another person "became aware of [his] patrol car. . . . They started running off and they dropped controlled substances. . . ." Field tests later revealed that the substances contained cocaine and heroin, which a trained and licensed chemist at the Puerto Rico Forensic Science Institute specializing in controlled substances corroborated in separate testimony. In the vehicle Rivera-Moreno and his associate abandoned, Officer

Ayala-Vega found Rivera-Moreno's driver's license, Social Security card, and medical plan card.

Rivera-Moreno argues that this evidence is insufficient because "[t]he United States did not have available at trial any audio, video[,] or photograph depicting [him] doing any illegal act. Much less, we should consider that no firearms, monies, or drugs were either seized or observed in [his] immediate presence." However, as we have previously observed, "[t]he fact that the government did not present certain kinds of evidence does not [necessarily] mean that there was insufficient evidence for conviction." *United States v. Liranzo*, 385 F.3d 66, 70 (1st Cir. 2004).

We find that the evidence presented was sufficient to convict Rivera-Moreno. The testimony of these four witnesses about Rivera-Moreno's role, relationships, and activities in Las Avispas Dos was sufficient for a jury to conclude beyond a reasonable doubt that Rivera-Moreno knowingly and voluntarily agreed with others to participate in, if not also to lead, Las Avispas Dos's drug-related activities.

In sum, a jury could have found beyond a reasonable doubt that Arzola-Martínez, Muñiz-Massa, and Rivera-Moreno were guilty of participating in the charged conspiracy. We have previously found similar evidence sufficient to sustain a drug-related conspiracy conviction. *See, e.g., United States v. Rodríguez-Lozada*, 558 F.3d 29, 39 (explaining that "[t]he evidence is more than sufficient for a rational

jury to find" that defendant was part of a drug-trafficking conspiracy where there was evidence of defendant's drug-related relationships and drug-supplying activities).

C. Ex Parte Communications

A third claim concerns the process by which the district court conducted voir dire at trial. In their initial appellate briefs, Arzola-Martínez, Pabón-Mandrell, and Rivera-Rodríguez claimed that the district court committed plain error when it conducted individual, ex parte voir dire of prospective jurors, which these Appellants argue violated Federal Rule of Criminal Procedure 43(a)(2). Through supplemental briefing that we ordered during oral argument, which the parties filed after the district judge held a supplemental hearing on March 12, 2010 ("the supplemental hearing"), the other two Appellants, Muñiz-Massa and Rivera-Moreno, also asserted this claim, arguing that "the method employed [was] the equivalent of depriving [A]ppellants of their Sixth Amendment constitutional right to a public trial and that they be present during all stages of the trial." Appellants thus request we find that the district court committed plain error by engaging in ex parte communications with prospective jurors and grant Appellants a new trial. The government responds that any ex parte conversations between the judge and jurors were not structural error and harmless beyond a reasonable doubt, and, in any case, Appellants waived any objection to them by not raising the

matter at trial. As discussed below, we find that the ex parte conversations that the district judge held with prospective jurors should be reviewed under – and fail to satisfy – the plain error standard.

1. Standard/Scope of Review

Neither Appellants nor the government objected to the ex parte communications described below at trial. The Supreme Court recently clarified the standard of review an appellate court must apply when considering a claim not raised at trial. *See United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010). The Supreme Court observed that "[Federal] Rule [of Criminal Procedure] 52(b) permits an appellate court to recognize a 'plain error that affects substantial rights,' even if the claim of error was 'not brought' to the district court's 'attention.'" *Id.; see also* Fed. R. Crim. P. 52(b). The Court held:

> an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Marcus, 130 S. Ct. at 2164 (alteration in original) (citations and internal quotation marks omitted).

As discussed below, we assume arguendo that Appellants' claim satisfies the first and second prong of the Supreme Court's articulation of the plain error standard. However, because we do not find that Appellants' claim satisfies the third prong, we need not resolve the fourth prong, and Appellants' claim fails. Before engaging in our plain error review, we summarize the ex parte communications and the district court's rationale for them.

2. The Ex Parte Communications

Appellants claim, and the government does not refute, that the district court conducted ex parte examinations of fifteen prospective jurors – Juror Nos. 1, 2, 3, 10, 13, 21, 23, 35, 40,[8] 41, 47, 58, 60, 64, and 66 – out of a total of seventy-one prospective jurors.[9],[10]

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[8] An inconsistency exists in the record with respect to Juror No. 40. At one point during voir dire on February 11, 2008, Juror No. 40 is recorded as referring to "my wife," whereas at another point on the same day the juror is recorded as referring to "[m]y husband." Furthermore, despite the jury list indicating a female name for Juror No. 40, the district judge, during the supplemental hearing, referred to the prospective juror using the masculine pronoun and mentioned the juror's "wife." The gender of the juror and the juror's spouse are irrelevant to our inquiry, so we need not resolve these matters.

[9] We derive the total number of prospective jurors from the district judge's list provided in Appellants' supplemental brief.

[10] In the cases of Juror Nos. 2 and 35, the trial transcript does not explicitly state that the conversations occurred "[a]t the bench," as the trial transcripts of the other ex parte communications do.

(Continued on following page)

In other words, 21 percent of the prospective jurors were examined ex parte by the district court. Six of those prospective jurors – Juror Nos. 1, 2, 10, 23, 35, and 40 – were not excused by the district judge and thus were candidates for peremptory strike challenges. Four of those unexcused prospective jurors – Juror Nos. 10, 23, 35, and 40 – were struck by the defendants (the government did not strike any of them), leaving two of those prospective jurors – Juror Nos. 1 and 2 – on the panel. As a result, 16.7 percent of the empaneled jurors were subjected to ex parte communications by the court during the voir dire process.

In the case of Juror No. 2, the district judge summarized the conversation when she summarized the ex parte communications she conducted with other prospective jurors, suggesting that the judge's communication with this juror was also ex parte. During the supplemental hearing, the district judge resolved this matter by acknowledging that the prospective juror "was examined at the bench."

In the case of Juror No. 35, the trial transcript reflects that that prospective juror stated his number and then that the district judge summarized what the prospective juror said. This portion of the transcript thus suggests that the district judge did conduct an unrecorded ex parte communication with this prospective juror.

Given that (1) the district judge summarized the conversations she had with both Juror Nos. 2 and 35, as she did with the other thirteen prospective jurors with whom she conducted ex parte communications, (2) Appellants claim and the government does not refute that Juror Nos. 2 and 35 were subject to ex parte communications, and (3) the district judge concedes that at least the communication with Juror No. 2 was ex parte, we assume that both of these jurors were indeed among the prospective jurors questioned by the district judge outside the presence of counsel.

The district judge employed various methods for memorializing these ex parte communications. For ex parte communications with nine of the fifteen prospective jurors (Juror Nos. 1, 2, 3, 10, 13, 21, 23, 40, and 47), the court reporter was present and the trial transcript thus reflects the conversations between the district judge and the prospective jurors. For ex parte communications with six of the prospective jurors (Juror Nos. 35, 41, 58, 60,[11] 64, and 66), the court reporter was not present and the trial transcript thus does not reflect the conversations between the district judge and the prospective jurors, or at least, in one of these cases (Juror No. 60), what the prospective juror said. After each of these six sets of unrecorded ex parte communications, the district judge provided a summary of the conversation, as reflected in the trial transcript.

In the course of conducting these ex parte communications with prospective jurors, the district judge made at least two mistakes of fact and at least one significant omission when summarizing the prospective

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[11] In the case of Juror No. 60, the trial transcript omits what the prospective juror said, noting only that it was in Spanish. The trial transcript does, however, reflect what the district judge stated. Because the transcript of the district judge's statement is within the portion of the transcript noted as being "[a]t the bench," and not "[i]n open court," that suggests that, contrary to Appellants' claim, the court reporter was present and did transcribe the district judge's statement, but omitted the prospective juror's statement. The Spanish answers of Juror No. 60 could have been translated by the court reporter if proper procedure had been followed.

jurors' statements to counsel. The two mistakes of fact concerned Juror Nos. 1 and 2, both of whom, as noted above, were ultimately empaneled on the jury. The omission concerned Juror No. 40, who, as noted above, was later removed by a peremptory strike exercised by defense counsel.

During the ex parte communication that the district judge held with Juror No. 1, that juror told the judge that his "son is incarcerated in the state of *Florida* for a drug related charge" (emphasis added). However, when summarizing the ex parte communication to counsel, the judge stated that this juror's "son had a drug case for which he is incarcerated in the state of *Connecticut*" (emphasis added). When asked whether either counsel wanted to question this juror, both parties did so briefly about a previous case in which the individual served as a juror. During the supplemental hearing, the district judge acknowledged that the state in which the juror's son was incarcerated "may have been misstated" but noted that "the information that the individual had a son incarcerated for a conviction . . . is correct."

During the ex parte communication that the district judge held with Juror No. 2, the juror told the judge that he "was a witness in court, in a *criminal case* for the defense" (emphasis added). When asked by the judge if it was "a *drug* case," the juror responded that "[i]t was a *criminal state case*" (emphasis added). However, when summarizing the ex parte communication to counsel, the judge stated that this juror "served as a witness in a local court case, he

was a witness for the defense and it was a *sex offender case.* He was a witness for the defense in a *criminal sex offender case*" (emphasis added). When asked whether either counsel wanted to question this juror, both parties declined.

During the ex parte communication that the district judge held with Juror No. 40, the juror told the judge: "The brother of my wife has been a drug user for sometime [sic]. He is now in the mental ward, he has never been a [sic] accused or anything like that, but that is the situation." When asked by the judge "[d]oes that affect your impartiality?," the juror responded "[h]opefully not." The record indicates that this information was not conveyed to counsel, either during the judge's summaries of the ex parte communications to counsel or at any other time.

3. The District Court's Rationale for the Ex Parte Communications

The district judge explained, before conducting the ex parte communications, that she felt they were necessary "to save time," because, given that the trial involved multiple defendants, "having 12 attorneys moving into and out of the bench [would] be time consuming." The district judge stated at the beginning of voir dire that, after she heard all of the prospective jurors' excuses for not being empaneled, she would "make a judgment call jointly with the attorneys." The district judge also stated that ex parte communications would enable prospective jurors to

discuss "personal matters" with the judge that the jurors did not "want to share . . . publicly." It was thus the district court – not one of the parties – that, *sua sponte,* initiated ex parte communications.

At the supplemental hearing, the district judge stated multiple times that the communications described above were all "on the record," despite not occurring in the presence of counsel and some not being recorded by the court reporter. She justified her explanation by stating that "notes were taken." The district court further stated that several of the communications are "not an issue" because the "juror was excused for cause" and thus "never became a member of the jury panel."

4. Plain Error Review

As the government concedes, ex parte communications between the judge and the jury may raise concerns under Federal Rule of Criminal Procedure 43(a) and the Fifth and Sixth Amendments. *See Presley v. Georgia,* 130 S. Ct. 721, 724 (2010) (holding that the Sixth Amendment right to a public trial extends to voir dire); *United States v. Gagnon,* 470 U.S. 522, 528 (1985) (explaining that the Sixth Amendment's Confrontation Clause gives the defendant the right to be present and confront all witnesses and evidence against him and that the Fifth Amendment's Due Process Clause protects the right to be present "in some situations where the defendant is not actually confronting witnesses or evidence

against him"); *Illinois v. Allen*, 397 U.S. 337, 338, 342-43 (1970) (holding that the Sixth Amendment protects a defendant's right not to be completely excluded from voir dire); Fed. R. Crim. P. 43(a).

Still, the defendant's right to be present during voir dire is not absolute, it must be balanced against the need to conduct a fair, safe, and orderly trial. *See, e.g., Presley*, 130 S. Ct. at 724-25 (noting that some circumstances may justify closing voir dire to the public); *Gagnon*, 470 U.S. at 526-27 (noting that "[t]he defense has no constitutional right to be present at every interaction between a judge and a juror" and holding that the Due Process Clause only protects the accused's right to be present when his presence has a reasonably substantial relationship to the need to defend himself); *Allen*, 397 U.S. at 342-43 (holding that a defendant, with disruptive behavior, may forfeit his Sixth Amendment right to be present); *see also United States v. Collazo-Aponte*, 216 F.3d 163, 182 (1st Cir. 2000) (finding no Rule 43 violation when the defendant was "restricted from full participation in a limited number of sidebar conferences that occurred during voir dire").

We assume arguendo that the first and second prongs of plain error review, as articulated in *Marcus*, are satisfied based on Federal Rule of Criminal Procedure 43(a) and the Fifth and Sixth Amendments. We thus consider the third prong in more detail. The Supreme Court noted that, "[i]n the ordinary case, to meet this [third prong] standard[,] an error must be 'prejudicial,' which means that there must be

a reasonable probability that the error affected the outcome of the trial." *Marcus,* 130 S. Ct. at 2164. In further explicating this prong, the Supreme Court noted "the possibility that certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an appellant's trial." *Id.*

We have previously observed that "[t]he [Supreme] Court has classified an error as structural in only a very limited class of cases." *United States v. Fazal-Ur-Raheman-Fazal,* 355 F.3d 40, 48 (1st Cir. 2004) (citation and internal quotation marks omitted). Examples of structural errors that the Court has identified include "complete denial of counsel, presence of a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and offering a defective reasonable doubt instruction." *Id.* (internal citations omitted). As we do not find that the ex parte communications constituted such "structural error," we assess whether there is "a reasonable probability that the error affected the outcome of the trial."

Very few of these ex parte communications even arguably affected the outcome of the trial. Of the fifteen ex parte communications, only six were not placed on the record, and of those six, only three jurors' information was incorrectly or incompletely communicated to the parties. Further, we cannot see how, had the district judge correctly told the parties that Juror No. 1's son was incarcerated in Florida

rather than Connecticut, the parties would have responded differently. That leaves us with only two jurors as the bases for Appellants' claim of substantial prejudice.

We find no reasonable probability that errors as to these jurors affected the trial's outcome. Appellants' argument asks us to make too many assumptions. Juror No. 2 did not answer the district judge's question about what kind of trial he was a witness in. Yet Appellants ask us to assume that, had the district court merely reported that he had been a witness in a criminal trial, counsel would have followed up and successfully learned what kind of trial it was. Counsel explicitly declined to ask any other questions of the witness at the court's invitation. Moreover, we must assume that the juror testified in a drug case, which Appellants have not established. And we must assume that, although he was a witness for the defense, Juror No. 2's participation in this hypothetical drug case so biased him against the defense that he affected the guilty verdict. These guesses do not establish a reasonable probability that Juror No. 2's participation affected the outcome of the trial.

Appellants make an equally attenuated argument regarding Juror No. 40, whose brother-in-law abused drugs. Appellants exercised a peremptory challenge and struck this juror. Thus, to conclude that the court's mistake probably changed the outcome of the trial, we must assume that Appellants would have moved to strike this juror for cause and that the court would have granted the motion.

We further must assume that Appellants would have exercised the peremptory they used for Juror No. 40 on another juror and that this other juror's replacement would have voted for an acquittal.

Because of the highly speculative nature of these counterfactuals and in light of the very strong evidence against these Appellants, we cannot conclude with any reasonable probability that the district judge's omission regarding Juror No. 40, along with the error the district judge made with respect to Juror No. 2, necessarily affected the outcome of the district court proceedings. We do not, for example, have any basis in the record to conclude that the ex parte communications and what followed from them violated Appellants' Sixth Amendment right to an impartial jury or that any change in the jury composition – whether or not it was impartial – would have affected the outcome of the district court's proceedings. *Cf. United States v. González-Meléndez,* 594 F.3d 28, 34 (1st Cir. 2010) ("[T]here is no basis in the record for concluding that the alteration in jury composition had an injurious influence on the verdict.").

Because Appellants cannot satisfy the third prong of the plain error test as articulated by the Supreme Court in *Marcus,* they fail to satisfy the plain error test itself. We thus need not reach the fourth prong, concerning whether "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Marcus,* 130 S. Ct. at 2164.

D. Arzola-Martínez's Allocution

We next address a claim concerning Arzola-Martínez's right to allocute during sentencing. Arzola-Martínez argues that the district court committed reversible error during his sentencing hearing when it granted him the opportunity to address his objections only to the PSR, a constraint which Arzola-Martínez argues violated Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) in not permitting him a full, personal opportunity to speak or present information to mitigate his sentence. Arzola-Martínez thus requests that we remand his case to the district court for resentencing.

1. Standard/Scope of Review

We review *de novo* a sentencing court's compliance with procedural rules, including Federal Rule of Criminal Procedure 32. *United States v. Burgos-Andújar*, 275 F.3d 23, 28 (1st Cir. 2001).

2. Legal Framework

Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) provides that, before imposing a sentence, the court must "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Where the court does not afford a defendant this opportunity or its functional equivalent, "the reviewing court must remand the case for resentencing, generally without needing to inquire into prejudice." *United States v.*

Catalán-Román, 585 F.3d 453, 475 (1st Cir. 2009) (citing *Burgos-Andújar*, 274 F.3d at 28).

We have found that the right of allocution conferred to criminal defendants by Rule 32(i)(4)(A)(ii) can be satisfied by its "functional equivalent." *United States v. Mescual-Cruz*, 387 F.3d 1, 11 (1st Cir. 2004). "To achieve functional equivalency, the court, the prosecutor, and the defendant must at the very least interact in a manner that shows clearly and convincingly that the defendant knew he had a right to speak on any subject of his choosing prior to the imposition of sentence." *Id.* (citation and internal quotation marks omitted).

3. Analysis

During the sentencing hearing that the district judge conducted with Arzola-Martínez on July 28, 2008, the court discussed Arzola-Martínez's PSR with his counsel, Juan Pedrosa ("Pedrosa"). At the end of that discussion, during which Pedrosa raised several objections to the PSR, the court asked Pedrosa: "So, counsel, any other statements that you would be submitting on behalf of your client?" Pedrosa responded: "No, Your Honor, just for allocution on his behalf."

After Pedrosa allocuted on behalf of Arzola-Martínez, the district court stated that "[Pedrosa] mentioned that [his] client wanted to address the court," and so asked Arzola-Martínez: "Let me ask you if you have any objections, any other objections or

any objections that you would like to discuss with the court, to the contents of the [PSR]?" After taking issue with some portions of the PSR, Arzola-Martínez argued that he was not guilty as a co-conspirator in Las Avispas Dos. He denied knowing certain witnesses or having visited certain places crucial to his conviction. After hearing Arzola-Martínez's statement, the court asked: "Any other statements[?]" Arzola-Martínez's counsel responded: "No [y]our Honor."

From the record of he [sic] sentencing transcript, several aspects of Arzola-Martínez's hearing are clear. The district judge provided Pedrosa with the opportunity to speak or present any information to mitigate the sentence of his client, Arzola-Martínez, which Pedrosa then did, asserting that he was doing so on his client's "behalf." The district judge then addressed Arzola-Martínez personally in soliciting any objections to the PSR specifically, which Arzola-Martínez then provided and took the opportunity to broaden into more general comments about the facts alleged in the instant case. Afterwards, in the context of this conversation between the district judge and Arzola-Martínez, the district judge generally provided further opportunity to speak or present any information to mitigate the sentence by soliciting "[a]ny other statements," an invitation that Pedrosa answered in the negative on behalf of himself and his client. Although Pedrosa answered this question, it may well have been directed to Arzola-Martínez.

We find that Arzola-Martínez was afforded the functional equivalent of the right to allocute during his sentencing hearing. That the trial court did not address its final question to Pedrosa by name or otherwise seem to address the question to any particular person supports the conclusion that the district court did not deny Arzola-Martínez his allocution opportunity. *See Green v. United States*, 365 U.S. 301, 304 (1961) (finding that the district court did not deny the defendant the allocution opportunity to which Rule 32(a) entitled him where the trial judge's question, "Did you want to say something?," without being addressed to any particular person, "may well have been directed to the defendant and not to his counsel"); *see also Domenica v. United States*, 292 F.2d 483, 486 (1st Cir. 1961) (distinguishing *Green*, 365 U.S. 301, by noting that in *Domenica* "there can be no mistake [about to whom an invitation for allocution was directed] . . . [because] the court's question was addressed to counsel by name"). The totality of the circumstances suggests to us that the interactions between the court, the prosecutor, and Arzola-Martínez "show [] clearly and convincingly that the defendant knew he had a right to speak on any subject of his choosing prior to the imposition of sentence." *Mescual-Cruz*, 387 F.3d at 11. We have held similarly in another case where a criminal defendant was not explicitly invited by the district court to speak on any subject of his choice. *See United States v. O'Connell*, 252 F.3d 524, 528 (1st Cir. 2001) (holding that the record demonstrated "clearly and convincingly" that criminal defendant "knew of his

right to speak prior to the imposition of his sentence and that he took advantage of that opportunity by communicating those things that he found important to say" where defense counsel "seized the opportunity before the district court had the chance to address [the defendant] unprompted," "expressed his views on an appropriate sentence," and indicated that his client would like to address the court, which the client then did). Accordingly, the district court committed no error concerning Arzola-Martínez's allocution.

E. Rivera-Rodríguez's Sentencing Based on Drug Quantity Responsibility

Rivera-Rodríguez argues that his sentence was based on an unreliable calculation of the quantity of drugs attributable to him. Specifically, he contends, the district court committed clear error in determining that the average weight of each crack capsule at the Borinquen Ward drug point was 0.075 grams, as this calculation was unsubstantiated by the evidence presented at trial. The district court, Rivera-Rodríguez argues, thus erroneously found him responsible for a total of more than 4.5 kilograms of crack cocaine.[12] Rivera-Rodríguez requests that

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[12] Rivera-Rodríguez does not challenge the mathematical formula and hypotheticals that the district court employed to conclude that if a vial of crack cocaine weighed 0.075 grams, Rivera-Rodríguez would be responsible for a total of more than 4.5 kilograms of crack cocaine. We thus focus only on Rivera-Rodríguez's challenge to the average weight of each vial.

we remand this issue to the district court for resentencing.

1. Standard/Scope of Review

"We review the district court's factual finding as to drug quantity for clear error." *United States v. Correa-Alicea,* 585 F.3d 484, 489 (1st Cir. 2009) (citation omitted); *see also United States v. Feliciano-Rodríguez,* 525 F.3d 85, 107 (1st Cir. 2008) ("A district court's factual finding regarding the amount of drugs attributable to a member of a drug conspiracy will be disturbed only if it is clearly erroneous." (citation omitted)). We have found that, to determine drug quantity, a district court

> looks to all acts that were part of the same course of conduct or common scheme or plan as the offense of conviction, and takes into account not only what the defendant knew, but what conduct he reasonably foresaw. . . . Thus, each co-conspirator is responsible not only for the drugs he actually handled but also for the full amount of drugs that he could reasonably have anticipated would be within the ambit of the conspiracy. The trial court's determination of drug quantity need only be by a preponderance of the evidence and is not required to be an exact determination but rather only a reasoned estimate. Further, if the trial court bases its estimate on one of two plausible views, the determination is not clearly erroneous.

Feliciano-Rodríguez, 525 F.3d at 107 (internal citations and quotation marks omitted). We also review for clear error challenges to factual findings made at sentencing. *United States v. Shinderman,* 515 F.3d 5, 18 (1st Cir. 2008).

2. Factual Findings

José A. Mercado-Negrón ("Mercado-Negrón"), a chemist who had worked twenty-six years for the Puerto Rico Forensic Science Institute, where he analyzed controlled substances, including crack cocaine, testified at trial. He stated that he had analyzed controlled substances in "thousands of cases" and had testified as an expert witness in federal court approximately five to six times and in state court hundreds of times. Mercado-Negrón further stated that, based on his experience analyzing crack cocaine seized in the area of Guayama, the average weight of a capsule of such crack cocaine was approximately 0.075 grams. Based on his testimony, the district court concluded that, in a given year, Las Avispas Dos could distribute 27 kilograms of crack cocaine and, through the life of the conspiracy, 109 kilograms of crack cocaine.

3. Analysis

Rivera-Rodríguez makes much ado about the fact that Mercado-Negrón did not personally weigh the capsules of crack cocaine distributed by Las Avispas Dos and instead relied on his experience to provide

his estimate of 0.075 grams per capsule. As Rivera-Rodríguez points out, at trial, the only exhibit upon which Mercado-Negrón relied was of powder cocaine, not crack cocaine. That exhibit contained two bags of powder cocaine totaling 0.080 grams that Rivera-Rodríguez sold to Luis A. Sepúlveda-Rivera ("Officer Sepúlveda-Rivera"), a member of the PRPD, in July 2006 while Officer Sepúlveda-Rivera was working undercover. Furthermore, Rivera-Rodríguez points to testimony of Rivera-Díaz in which Rivera-Díaz stated that he did not weigh the amounts of crack cocaine he placed into vials to be sold because he did not have the proper equipment to do so and because he did not pay attention to exactly what amount of crack cocaine he would measure and then deposit into the vials.

We find that the district court did not clearly err in relying on Mercado-Negrón's figure of 0.075 grams of crack cocaine per capsule even though Mercado-Negrón did not personally weigh the capsules of crack cocaine at issue in this case. "The court's finding as to drug quantity was not a mere hunch or intuition, but was a reasoned estimate based on reliable evidence in the record." *Correa-Alicea,* 585 F.3d at 490 (internal citation and quotation marks omitted). The district court's reasoned estimate here was based on Mercado-Negrón's extensive experience as a forensic chemist specializing in controlled substances, including crack cocaine, for which he was admitted to testify at trial as an expert, and he had previously analyzed crack cocaine seized from the location in which Las Avispas Dos operated. Rivera-Rodríguez also presented no

developed argument about an alternative weight on which the district court could rely to formulate its calculations for sentencing. It was thus in the district court's discretion to rely on Mercado-Negrón's testimony in assessing the drug quantity for which Rivera-Rodríguez was responsible. *See United States v. Rivera-Maldonado,* 194 F.3d 224, 228 n.2 (1st Cir. 1999) ("The sentencing court possesses broad discretion in determining which data are sufficiently dependable for sentencing purposes."). Indeed, other circuits "have endorsed other practices that yield only very rough estimates of quantity." *United States v. Uwaeme,* 975 F.2d 1016, 1019 (4th Cir. 1992).

F. Arzola-Martínez's and Pabón-Mandrell's Sentencing Based on Prior Criminal History

Arzola-Martínez and Pabón-Mandrell argue that the district court, in calculating their sentences, erroneously used their prior criminal histories. Arzola-Martínez contends that the district court improperly used his prior simple possession deferrals, which he argues never became final convictions, to apply the three strikes mandatory life imprisonment provisions of 21 U.S.C. §§ 841(b)(1)(A), 851, and 860. Pabón-Mandrell contends that the district court improperly utilized his two simple possession narcotics convictions, the underlying conduct of which was specifically included as an overt act of Count One, to apply the three strikes mandatory life imprisonment provisions of 21 U.S.C. §§ 841(b)(1)(A), 851, and 860.

Arzola-Martínez and Pabón-Mandrell thus request that we set aside their sentences and remand their cases to the district court for resentencing.

The government responds that Arzola-Martínez and Pabón-Mandrell's sentences should be affirmed because their prior felonies were sufficient under 21 U.S.C. § 851. As discussed below, we agree.

1. Standard/Scope of Review

We review *de novo* questions of the proper interpretation of statutes, including whether prior convictions count for purposes of 21 U.S.C. § 851. *See United States v. Lino,* 493 F.3d 41, 43 (1st Cir. 2007). To trigger "a mandatory term of life imprisonment without release," 21 U.S.C. § 841(b)(1)(A) requires that the defendant have "two or more prior convictions for a felony drug offense" and that those prior convictions "have become final."

2. Analysis

a. Arzola-Martínez's Sentencing

To support its determination that Arzola-Martínez was subject to a life sentence under the provisions of 21 U.S.C. § 841(b)(1)(A), the district court cited three instances in 2000 in which Arzola-Martínez was found in possession of marijuana and/or crack cocaine. These arrests and related charges were processed by the Commonwealth of Puerto Rico. The cases were consolidated and, in 2001, upon Arzola-Martínez's

guilty plea to the charges, the Puerto Rico Superior Court ("PRSC") placed Arzola-Martínez on probation for a term of eighteen months under a rehabilitation program. Pursuant to a favorable 2002 report by the coordinator of Arzola-Martínez's rehabilitation program, the PRSC expunged what the PSR termed the "conviction" resulting from these incidents.

Arzola-Martínez argues that, contrary to the requirements of 21 U.S.C. § 841(b)(1)(A), none of these instances, which Arzola-Martínez characterizes as "simple drug possession cases," qualify as a "prior conviction[ ]" that has "become final." Arzola-Martínez bases this contention on his argument that, "since no conviction nor finding of guilt was ever entered[,] no appeal could have been taken." To support this conclusion, Arzola-Martínez notes that he entered the rehabilitation program and the PRSC expunged the record of these two cases. He further observes that Puerto Rico Rule of Criminal Procedure 247.1 provides that the rehabilitation program be "implemented without a finding of guilt" and "shall not be deemed as a conviction."

Arzola-Martínez's arguments are unavailing. The Supreme Court and our circuit indicate that federal law and not, as Arzola-Martínez argues, Puerto Rico Rule of Criminal Procedure 247.1 determines whether these instances constitute prior convictions under 21 U.S.C. § 851. *Cf. Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111-12 (1983) ("Whether one has been 'convicted' within the language of the gun control statutes is necessarily . . . a question of federal,

not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State. This makes for desirable national uniformity unaffected by varying state laws, procedures, and definitions of 'conviction.'" (internal citations omitted)); *United States v. Bustamante*, 706 F.2d 13, 14 (1st Cir. 1983) (describing the holding in *Dickerson*). Although *Dickerson* and *Bustamante* related to the federal gun control statute, we see no justification why their underlying reasoning should not be applied, as here, to felony drug offenses. Indeed, we have already cited the principles for which *Dickerson* and *Bustamante* stand in adjudicating other cases involving felony drug offenses. *See United States v. Cuevas*, 75 F.3d 778, 782 (1st Cir. 1996) ("The decisions in *Dickerson* and *Bustamante* still stand for the proposition that, absent legislative indication to the contrary, the meaning of 'conviction' for purposes of a federal statutory scheme is to be determined under prevailing federal law."). Consequently, we find that the district court properly considered Arzola-Martínez's prior criminal history based on federal – not state – law.

Moreover, we find that these incidents do constitute "convictions" for the purposes of 21 U.S.C. § 851. We agree with our sister courts of appeals that,

> [f]or purposes of sentences imposed under § 841, . . . Congress has not exempted from the "prior convictions" that must be counted those convictions removed from a criminal record for policy reasons unrelated to

> innocence or an error of law. The courts of appeals that have considered this § 841 question therefore have counted prior felony drug convictions even where those convictions had been set aside, expunged, or otherwise removed from a defendant's record for such reasons.

United States v. Law, 528 F.3d 888, 911 (D.C. Cir. 2008) (citing cases from the Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits). We thus find that Arzola-Martínez's prior offenses qualify as "convictions" pursuant to 21 U.S.C. § 851.

b. Pabón-Mandrell's Sentencing

On March 30, 2005, Pabón-Mandrell was arrested for illegally possessing, with the intent to distribute, cocaine ("the 2005 incident"). His conviction became final on June 20, 2006, when he was sentenced to probation. Pabón-Mandrell argues that, when the government chose to include the 2005 incident as part of Count One,[13] the government "waived the right to claim the local conviction arising out of said incident as a predicate 'prior' conviction for purposes of qualifying [Pabón-Mandrell] as a third strike offender." Pabón-Mandrell bases this argument

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[13] The indictment's section on "Overt Acts in Furtherance of the Conspiracy" includes the following: "On or about March 30, 2005, [Pabón-Mandrell] possessed a measurable amount of cocaine and marihuana, in or around the area of a 'drug distribution point', located in Borinquen Ward, Guayama, PR."

on our holding in *United States v. De Jesús-Mateo* that "[p]rior felony drug convictions will be counted separately for purposes of 21 U.S.C. § 841(b) *only when* they represent distinct criminal episodes," 373 F.3d 70, 74 (1st Cir. 2004) (emphasis added) (citation omitted), and that the March 2005 incident was not a "distinct criminal episode[ ]" from the charged offense in Count One. Regardless, the district court did include the 2005 incident in making its determination that the three strikes mandatory life term applied to Pabón-Mandrell.

The same case Pabón-Mandrell cites settles this matter. In *De Jesús Mateo* [sic], we held that our circuit's precedent forecloses the argument that prior convictions do not represent "distinct criminal episodes" when they are part and parcel of a defendant's participation in a drug trafficking conspiracy. 373 F.3d at 74 (holding that prior convictions for separate drug transactions that were eleven months apart constituted separate criminal episodes even though the conduct underlying both convictions was arguably part of the same conspiracy). Our reasoning in *De Jesús-Mateo* relied on an earlier ruling, in *United States v. Martínez-Medina*, in which we quoted a Ninth Circuit opinion stating that

> [a]n ongoing course of criminal conduct such as narcotics trafficking may involve many such criminal episodes, each a discrete occurrence. The fact that all are related, part of a series, or part of a continuous course of criminal dealing, does not necessarily render

> them a "single" criminal episode, particularly where the episodes occur over time. To so hold would insulate the very career criminals the statute is designed to reach – those continuously engaged in criminal conduct.

279 F.3d 105, 123 (1st Cir. 2002) (quoting *United States v. Maxey*, 989 F.2d 303, 307 (9th Cir. 1993) (holding that the district court properly imposed a life sentence under 21 U.S.C. § 841(b)(1)(A) because the defendant's prior convictions, although part of one drug trafficking conspiracy, stemmed from several transactions occurring several months apart)). We also have previously held that "[a] prior drug conviction constitutes a 'distinct criminal episode' sufficient to trigger the enhancement so long as the defendant continued to participate in drug activity after the conviction became final." *Lino*, 493 F.3d at 43.

The 2005 incident, despite being part of the drug conspiracy of which Pabón-Mandrell was charged in the instant case, constitutes a "distinct criminal episode[]" because Pabón-Mandrell continued to participate in drug activity after that conviction became final. Rivera-Díaz and Brito-Pacheco testified at trial that Pabón-Mandrell was the "runner" of heroin for Las Avispas Dos. Irving Ofray-Vázquez ("Agent Ofray-Vázquez"), an FBI agent, testified during Pabón-Mandrell's sentencing hearing that Pabón-Mandrell participated in the drug conspiracy charged in the instant case even after he was convicted for the 2005 incident and put on probation in June 2006. Specifically, Agent Ofray-Vázquez testified that, as late as

December 2006, Pabón-Mandrell was still a leader of Las Avispas Dos at the La Pluma drug point. As evidence to support this conclusion, Agent Ofray-Vázquez cited the statement of a cooperating witness who reported that, in almost all cases, either Pabón-Mandrell or another man would pick up money from or take drugs to be sold at La Pluma. Agent Ofray-Vázquez also stated that further testimony provided to him by informants, including Rivera-Díaz, indicated that Pabón-Mandrell had a "big role" in Las Avispas Dos from its inception in 2003 until law enforcement ceased its operations in 2007. Agent Ofray-Vázquez also testified that, even after June 2006, while he was conducting surveillance on the areas, Agent Ofray-Vázquez "always" saw Pabón-Mandrell at both the La Pluma and Las Vías drug points.

The mere fact that Pabón-Mandrell's conduct during the March 2005 incident was cited in the list of overt acts in the instant case's indictment does not mean the government waived its assertion that the associated conviction was a prior conviction for purposes of qualifying Pabón-Mandrell as a third strike offender. Although there is no indication that the conduct leading to the prior convictions at issue in *De Jesús-Mateo* was listed in that case's indictment, the distinction does not compel a different outcome here. In *De Jesús-Mateo*, we explicitly noted the failure of the defendant's attempt to distinguish his case from *Martínez-Medina* on the basis that, in *De Jesús-Mateo*, "the government presented evidence

of marijuana trafficking . . . which was the same conduct underlying De Jes[ú]s's prior marijuana conviction." 373 F.3d at 75 n.3. We observed that

> [t]he dispositive point here is not that evidence of De Jes[ú]s distributing marijuana was presented at his conspiracy trial but rather that his prior cocaine conviction was a separate criminal episode from his prior marijuana conviction even though the conduct underlying both convictions was arguably part of the same conspiracy. As for any claim that the conspiracy comprised the same episode as either of the two prior convictions, the short answer is that the conviction in this case was for conspiring to distribute heroin and cocaine, an episode continuing well beyond either of the prior convictions for discrete episodes of possession and distribution.

Id. Similarly, the dispositive point here is not that an allegation of Pabón-Mandrell possessing, with the intent to distribute, cocaine was included as an overt act in the indictment in the instant case but rather that his prior cocaine conviction was a separate criminal episode from his conspiracy conviction even though the conduct underlying both convictions was arguably part of the same conspiracy. Pabón-Mandrell's conviction in the instant case was for conspiring to possess with intent to distribute and actual distribution of narcotics, an episode continuing well beyond his prior conviction for a discrete episode of possessing, with the intent to distribute, cocaine.

Both Arzola-Martínez and Pabón-Mandrell also argue that at least one of the prior convictions that the district court counted in sentencing each of them to the three strikes life terms should not, in fact, count because the law's "absurd result" of punishing "cases of simple possession involving small amounts of drugs" is "counter to Congressional intent" to punish "dangerous narcotics traffickers." While acknowledging that the "literal application of the language utilized in the statute may appear to foreclose any further analysis concerning its proper application" here, to support their contentions, these two Appellants nonetheless cite the Supreme Court's decision in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11 (1989), in which the Court held that a statute's literal interpretation can be ignored if it "can't mean what it says" (citation omitted). *See also id.*, 490 U.S. at 527 (Scalia, J., concurring) (suggesting that the literal interpretation of a statute can be ignored if it "produces an absurd, and perhaps unconstitutional, result"). However, besides punishing serious drug offenders, we have observed that an additional purpose of such a sentencing enhancement is to punish recidivism. *See Lino,* 493 F.3d at 43. Such recidivism is a concern with both of these Appellants, given that their prior convictions and the instant case all relate to drug offenses. "Indeed, if the rule advocated by [Arzola-Martínez and Pabón-Mandrell] were adopted, we would insulate the very career criminals the [enhancement] is designed to reach – those continuously engaged in criminal conduct." *Id.* at 43-44 (citation and internal quotation marks omitted)

(alterations in the original). As such, imposing the three strikes life term on Arzola-Martínez and Pabón-Mandrell for these repeat offenses is neither absurd nor a violation of Congressional intent.

In sum, we find that the district court did not err in counting the aforementioned instances as "prior convictions" that led the district court to impose the three strikes life term on the felony drug offense repeat offenders Arzola-Martínez and Pabón-Mandrell.

III. Conclusion

We conclude that there was sufficient evidence adduced at trial for the jury to convict Arzola-Martínez, Muñiz-Massa, and Rivera-Moreno. We further conclude that the ex parte conversations that the district judge held with prospective jurors were not plain error. Moreover, the district court did not err with respect to the various sentencing claims made by Arzola-Martínez, Rivera-Rodríguez, and Pabón-Mandrell. Accordingly, the judgment of the district court is affirmed.

Affirmed.

UNITED STATES DISTRICT COURT

FOR THE JUDICIAL District of PUERTO RICO

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: 3:07 CR. 0121-05 (ADC)
EDUARDO PABON-MANDRELL True Name: Eduardo Luis Pabón-Mendrell	USM Number: 31107-069 JOSE LUIS BARRETO, ESQ. Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) as to Count One (1) on 2-27-2008 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21: § 841, 846, 860 and § 851	Conspiracy to possess with intent to distribute in excess of one (1) kilogram of heroin, five (5) kilograms of cocaine, fifty (50) grams of cocaine base and 100 kilograms of marihuana.	03-19-2007	One (1)

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

X Count(s) Two (2) X is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 6, 2008
Date of Imposition of Judgment

s/ Aida M. Delgado-Colón
Signature of Judge

Aida M. Delgado-Colón, U.S. District Judge
Name and Title of Judge

June 6, 2008
Date

E-Mail: USM, MDC, PTS, PO & FC

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Term of imprisonment: remainder of his natural life.

X The court makes the following recommendations to the Bureau of Prisons:

The defendant be afforded drug rehabilitation treatment, vocational training, educational and employment opportunities. The defendant be afforded health care. Designation on the East Coast of the Continental United States.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Ten (10) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall not unlawfully possess a controlled substance.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony,

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall refrain from the unlawful use of controlled substances and submit to a drug test within fifteen (15) days of release. Thereafter, submit to random drug test, not to exceed 104 samples per year in accordance with the Drug Aftercare Program Policy of the U.S. Probation Office approved by this Court. If any such samples detect substance abuse, the defendant shall participate in a drug treatment program (in-patient or out-patient)

in accordance with such policy. The defendant is required to contribute to the cost of services rendered (co-payment) based on the ability to pay or availability of third party payments, as approved by the Court.

The defendant shall participate in a vocational training and/or job placement program recommended by the U.S. Probation Officer.

The defendant shall provide the U.S. Probation Officer access to any financial information upon request.

The defendant shall submit his person, residence, office or vehicle to a search conducted by a United States Probation Officer at a reasonable time and in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

The defendant shall cooperate in the collection of a DNA sample as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code § 3563(a)(9).

Having considered the defendant's financial condition, the Court finds that the defendant does not have the ability to pay a fine. However, a special monetary assessment in the amount of $100 is imposed as required by law.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ N/A	$ N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0	$ 0	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

_____

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. **EDUARDO PABON MENDRELL [sic],** Defendant.	**Criminal no. 07-121 (ADC)**

INFORMATION IN ACCORDANCE WITH TITLE 21 UNITED STATES CODE § 851

(Filed Feb. 11, 2008)

THE UNITED STATES ATTORNEY CHARGES:

I, Rosa Emilia Rodriguez-Vélez, United States Attorney for the District of Puerto Rico, do accuse the above named Defendant, who was charged by Indictment on the 19th day of March, 2007, in the District of Puerto Rico for conspiring to commit the following offense against the United States, to wit: knowingly and intentionally possess with intent to distribute multikilogram quantities of controlled substances, that is: in excess of one (1) kilogram of heroin, a schedule I, Narcotic Controlled Substance; in excess of five (5) kilogram of cocaine, a Schedule II, Narcotic Controlled Substance; in excess of fifty (50) grams of a mixture and substance containing a detectable amount of cocaine base, a Schedule II, Narcotic Controlled Substance, and in excess of one hundred

(100) kilograms of marihuana, a schedule I, Narcotic Controlled Substance, in violation of Title 21, *United States Code*, Sections 841(a)(1) & (b)(1)(A), 846 and 860 after having been previously convicted in court for a felony drug offense which has become final as described herein:

PRIOR FELONY DRUG OFFENSE

Defendant's felony drug offense conviction in Guayama, Puerto Rico, Criminal Case Numbers **GSC2003G0748**, Puerto Rico Controlled Substance Law, which is final.

Defendant's felony drug offense conviction in Guayama, Puerto Rico, Criminal Case Numbers **GSC2003G0749**, Puerto Rico Controlled Substances Law, which is final.

Defendant's felony drug offense conviction in Guayama, Puerto Rico, Criminal Case Numbers **GSC2005G0402**, Puerto Rico Controlled Substances Law, which is final.

The United States informs defendant Eduardo Pabon Mendrell [sic] that it intends to rely on the above mentioned convictions at the time of sentencing to enhance Defendant's minimum mandatory sentence from a term of imprisonment of ten (10) years, to a mandatory minimum term of life imprisonment

without release, pursuant to Title 21, *United States Code*, Sections 841(a)(1), 841(b)(1)(A), 860 and 851.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 8th day of February, 2008.

/s/ Rosa E Rodriguez-Vélez
Rosa Emilia Rodriguez-Vélez
United States Attorney
Torre Chardón, Suite 1201
350 Carlos Chardón Street
San Juan, Puerto Rico, 00918
Tel. (787) 766-5656

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this date a true and correct copy of the foregoing has been hand delivered to defendant's counsel of record:

/s/ José Capó-Iriarte
José Capó-Iriarte
Assistant U.S. Attorney

CERTIFIED TRANSLATION

COMMONWEALTH OF PUERTO RICO
GENERAL COURT OF JUSTICE
COURT OF FIRST INSTANCE
COURT ROOM 308

THE PEOPLE OF PUERTO RICO v. EDUARDO PABON MENDRELL [sic] DEFENDANT	CRIMINAL NO. G SC2003G0748, GSC2003G 0749 G SC2003G0402 [sic] RE: VIOLATION ARTICLE. 401 RECL..404 C. S.ACT VIOL. ART. 412 RECL ARTICLE 404 OF THE.C. S.ACT VIOLATION ARTICLE 401 RECL. ARTICLE 404 C.S. ACT

– MINUTES –

(Filed May 30, 2008)

To the trial on the merits in case G SC2005G0402 appears the defendant represented by Attorney Miguel Pérez Vázquez; and in cases GSC2003G0748 and GSC2003G0749 for sentencing appears substituting Attorney Luis A. Burgos Rivera. The Prosecutor is represented by Assistant District Attorney José J. Bermúdez.

Attorney Pérez Burgos [sic] informs that in case GSC2005G0402 he filed a motion for Suppression of Evidence, which he believes is dismissed.

In relation to that count, District Attorney Bermúdez Santos requests the amendment of the

charges in order for Article 404 of the Controlled Substances Act appear.. Besides, the request

[**ROUND BLUE INK SEAL** of the Commonwealth of Puerto Rico, Court of First Instance, Guayama Superior Part, General Court of Justice]

Name of the Judge: ALDO J. GONZALEZ QUESADA

Name of the Court Reporter: MAYRA ALICEA ANAYA

Name of Marshal: LUIS MARTÍNEZ CINTRÓN

I Certify: GLORIA GUZMÁN BERMÚDEZ
Clerk
[Illegible Initials]
By: IRIS R. LÓPEZ MARTÍNEZ
DATE: June 20, 2006

Certified to be a correct translation.
Lauren M. Garcia /s/ LMG
Certified Federal Court Interpreter and Translator

Is that the defendant be sentenced today for said count, based on the pre-sentence report which was submitted for the two counts pending sentencing for Violation of Article 404 and 412 of the Controlled Substances Act.

The Court orders the amendment to the indictment in case G SC2005G0402, which originally charged Violation of Article 401, for Article 404 of the Controlled Substances Act to appear. It dismisses the Suppression of Evidence filed in case G SC2005G0402.

[Page 2 – G SC2033G0748 [sic] and others]

Attorney Pérez Burgos [sic] informs that his client wants to waive his constitutional right for Jury Trial, for which he submits for the consideration of the Court a document titled Waiver of the Right to Jury Trial.

The Court, after having explained in detail to him the institution of the jury, is satisfied that the waiver is freely, voluntarily and with knowledge of the nature that this implies. The Court accepts the waiver to the constitutional right to trial by jury and orders that proceedings continue by Court of Law.

Attorney Pérez Burgos [sic] informs that his client will plead guilty in case GSC2005G0402 for Violation of Article 404 of the C.S. Act.

The defendant, after having been examined by the Court ratifies his decision of pleading guilty and states that the signature appearing on the motions is his. He states that his decision is freely, voluntarily, with knowledge of the nature of the crime charge and its consequences.

The Court explains to him in detail the consequences of pleading guilty; in addition to the waiver of certain constitutional rights that this entails. The Court accepts the plea of guilty understanding that it is freely, voluntarily, with knowledge of the nature of the crime and its consequences.

The Court declares the defendant guilty and convicted of a violation of Article 404 of the Controlled Substances Act.

Attorney Pérez Burgos [sic] informs that there is no legal impediment to pronounce sentence today.

[**ROUND BLUE INK SEAL** of the Commonwealth of Puerto Rico, Court of First Instance, Guayama Superior Part, General Court of Justice]

The Court proceeds to pronounce the following sentence:

G SC2003G0748 and G SC2003G0749 for two counts for Violation of Article 404 of the Controlled Substances Act [the Court] imposes him a sentence of two (2) years in prison on each case to be served concurrently with each other.

G SC2005G0402 for Violation of Article 404 of the Controlled Substances Act [the Court] imposes him a sentence of two (2) years in prison, but this sentence shall be served consecutively with the previous cases.

[Illegible Initials]

[Page 3 – G SC2033G0748 [sic] and others]

He is ordered to pay the costs. He is ordered to pay the vouchers pursuant to Law 183, which he shall pay within 30 days, and which are due on September 7, 2006.

The Court uses the pre-sentence report that it received for the cases that were scheduled for sentence today and grants him the benefits of a regular probation with the following conditions:

1. **You cannot leave the jurisdiction of Puerto Rico.**
2. **You cannot use controlled substances.**
3. **You cannot commit crimes.**
4. **You cannot attend places where alcoholic beverages are sold.**
5. **If you pay alimony you must keep it up to date.**
6. **You must be at your house at 7:00 a.m.**
7. **You must be working or studying, and submit evidence to the socio-penal technician.**
8. **You must submit to toxicological tests to detect controlled substances, which may be administered by the Institute of Forensic Sciences or a private clinical laboratory. If the latter, the probationer shall assume the cost of the tests. You shall provide evidence of your attendance to treatment.**
9. **You shall attend weekly to the Corporation for Educational, Psychological and Social Services of Puerto Rico.**

You are warned that if you fail to comply with any of the conditions, the revocation process will begin, and if cause is determined, your privilege shall be revoked, and sentence shall be entered. which you will serve in a penal institution.

(**ROUND BLUE INK SEAL** of the Commonwealth of Puerto Rico, Court of First Instance, Guayama Superior Part, General Court of Justice]

CERTIFICATE ON FIRST PAGE (Illegible Initials]
BY IRIS RAQUEL LOPEZ MARTINEZ
COURT ROOM SERVICES CLERK

[Back of Third Page of the Original]

[Square Blue Ink Stamp; CERTIFICATE]

I HEREBY CERTIFY that this is a true and exact copy of the original entered in the instant case record and I issue the same at the request of [Handwritten Text – José Luis Barreto Rampolla, Esq.]

☐ For official use, no fees

☑ Prior to payment of fees

In Guayama, PR [Handwritten Text] May 23, 2008.

Gloria M. Guzmán Bermúdez
Regional Clerk
Clerk

By: [Illegible Signature]
Deputy Clerk]

[$1.00 Internal Revenue Stamp Affixed and Cancelled
Department of the Treasury Commonwealth of Puerto Rico
Number DO2259899]
[Handwritten DO2259899]

[$0.50 Internal Revenue Stamp Affixed and Cancelled
Department of the Treasury Commonwealth of Puerto Rico
Number DO1374615]
[Handwritten DO1374615]

[Blue Ink Stamp CANCELLED]

[**ROUND BLUE INK SEAL** of the Commonwealth of Puerto Rico, Court of First Instance, Guayama Superior Part, General Court of Justice]

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
GUAYAMA SUPERIOR PART
COURT ROOM 308

THE PEOPLE OF PUERTO RICO v. ALEXANDER DUPREY REYES Defendant	CRIMINAL NO. G SC2003G0746 and 0747 RE: VIOL. ART. 401 C.S.A. REB. ART. 404 VIOL. ART. 412 C. S.A.
THE PEOPLE OF PUERTO RICO v. EDUARDO PABON MENDRELL [sic] Defendant	CRIMINAL NO. G SC2003G0748 and 0749 RE: NIOL. [sic] ART. 401 C.S.A. REB. ART. 404 VIOL. ART. 412 C.S.A.

– MINUTES –

(Filed May 30, 2008)

To the **trial on the merits**, appear the defendants represented by Attorney Luis A. Burgos Rivera. The ProsecutION [sic] appears represented by Assistant District Attorney Jose J. Bermudez Santos.

The defendants, through their attorney, waive their right to a jury trial both verbally and in writing.

[**ROUND BLUE INK SEAL** of the Commonwealth of Puerto Rico, Court of First

Instance, Guayama Superior Part, General Court of Justice] [Illegible Handwritten Initials on left margin.]

Having been examined to this effect, the Court accepts the same understanding that it has been freely, voluntarily and intelligently, pursuant to law, and orders that proceedings in these cases be heard by Court of Law.

The Court makes reference to the minutes of April 18, 2006, which indicate that the defense waived the request for suppression of evidence because an agreement was reached with the District Attorney's Office.

The defense informs that it is correct and the pre-agreement is that the crimes of Articles 401 and 412 of the Controlled Substances Act shall be reclassified to Article 404(b) of the same Act.

The Prosecutor states that what the defense has reported is correct and to this effect he requests an amendment to the indictment of each defendant to reflect two counts for Article 404(b) of the Controlled Substances Act.

At the request of the Prosecutor, the Court orders the amendment to the indictments in order for each to impute violation of Article 404(b) of the Controlled Substances Act.

The defense submits to the consideration of the Court the pre-agreement and plea of guilty motions.

The defendant ratifies his decision of pleading guilty and states that the signature appearing on the motions is his.

Having the defendants been examined to this effect, the Court accepts the plea of guilty understanding that it has been [made] freely, voluntarily, and intelligently, with knowledge of the nature of the crimes charged and their consequences, and declares them guilty and convicted of two counts for Violation of Article 404(b) of the Controlled Substances Act.

At the request of the defense and without objection from the District Attorney, the defendants are referred to the Diversion Program offered by the Corrections Administration to be evaluated.

Sentencing is scheduled for July 20, 2006 at 8:30 in the morning.

Defendants are subpoenaed in open court, after warnings of law.

Attorney is notified.

[**ROUND BLUE INK SEAL** of the Commonwealth of Puerto Rico, Court of First Instance, Guayama Superior Part, General Court of Justice]

Name of the Judge:

ALDO J. GONZALEZ QUESADA

Marshal:

LUIZ MARTÍNEZ CINTRÓN

Name of the Court Reporter:

MARÍA DEL C. SANTIAGO VAZQUEZ

I certify: GLORIA GUZMÁN BERMÚDEZ
Acting Regional Clerk

[Illegible Initials]

By: WANDA L. COLÓN RUIZ
Court Room Services Clerk

Date: June 13, 2006

Transcribed: June 14, 2006

[Back of Second Page]

[Square Blue Ink Stamp; CERTIFICATE
I HEREBY CERTIFY that this is a true and exact copy of the original entered in the instant case record and I issue the same at the request of [Handwritten Text – Jose Luis Barreto Rampolla, Esq.

☐ For official use, no fees

☑ Prior to payment of fees

In Guayama, PR [Handwritten Text] May 23, 2008.

Gloria M. Guzmán Bermúdez
Regional Clerk
Clerk

By: [Illegible Signature]
Deputy Clerk]

[$1.00 Internal Revenue Stamp Affixed and Cancelled Department of the Treasury Commonwealth of Puerto Rico Number DO2259900]

[Handwritten DO2259900]

[$0.50 Internal Revenue Stamp Affixed and Cancelled Department of the Treasury Commonwealth of Puerto Rico Number DO1374616]

[Handwritten DO1374616]

[Blue Ink Stamp CANCELLED]

[**ROUND BLUE INK SEAL** of the Commonwealth of Puerto Rico, Court of First Instance, Guayama Superior Part, General Court of Justice]

LAUREN M. GARCIA
SSN [Social Security Number Omitted]
FEDERAL COURT INTERPRETER
473 ARRIGOITIA ST.
HATO REY, P. R. 00918
787-637-4248
laurenga@nelinkor.net

May 27, 2008

INVOICE

TO: José Luis Barreto Rampolla, Esq.
Phone: (787) 409-5085

FROM: LAUREN M. GARCIA
Certified Interpreter

RE: People of Puerto Rico v. Eduardo Pabón Mendrell
Prison Sentence Suspended and Probation
Resolution June 1, 2006
Minutes June 20, 2006

For translations in above case:

2932 words at $0.20 per word $586.40

Total $586.40

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA	/	CR. 07-0121 (ADC)
VS.	/	(Filed Nov. 22, 2008)
EDUARDO PABON MANDRELL,	/	

SENTENCING HEARING

Was held before the HONORABLE AIDA M. DELGADO COLON on Friday, June 6, 2008.

FOR THE GOVERNMENT:

JOSE CAPO, AUSA

FOR THE DEFENDANT:

JOSE LUIS BARRETO, ESQ.

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[1075] THE COURT: Exactly, so what we have is an offense of October 18, 2003, for which basically the defendant was on bail. Those are controlled substance charges, basically two counts, separate counts for which the government provided notice and included within notice by the case number GSC2003C0748 and 49. Then we have a subsequent offense which is of March 30, 2005, not within a week span but rather two years or a year and a couple of months more or less, which is another drug offense which is the one, another one for which the government included in a notice with the number

GSC2005G0402. The fact that it happens that he pled [1076] guilty on the same date and sentenced on the same date, does not turn them into a single offense.

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[1136] [THE COURT] . . . In terms of the defendants actions and dealing within the organization I think I will not delve more into what I discussed before, regarding the evidence and adjustments here. For me it is quite difficult to think that a life in prison sentence has to [1137] be imposed, not needs to be, has to be imposed on an individual so young. But it is also shocking and amazing to see that someone so young and with so many opportunities in terms of his upbringing provided to him, has achieved up to this stage in terms of drug dealings and murders. Given my determination and the application and the governments filing of the information under 851, the court is compelled to impose a life sentence.

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